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S.B. No. 75

A BILL TO BE ENTITLED

AN ACT

relating to the definition and regulation of unlawful trade, acts and practices, the protection of Texas consumers, and providing for consumer remedies; amending Chapter 17, Business & Commerce Code, as amended, by adding Subchapter E; repealing Chapter 10, Title 79, Revised Civil Statutes of Texas, 1925, as amended (Articles 5069-10.01 et seq., Vernon's Texas Civil Statutes); and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. Chapter 17, Business & Commerce Code, as amended, is amended by adding Subchapter E to read as follows:

"SUBCHAPTER E. DECEPTIVE TRADE PRACTICES AND
CONSUMER REMEDIES

"Sec. 17.41. SHORT TITLE. This subchapter may be cited as the Deceptive Trade Practices-Consumer Remedies Act.

"Sec. 17.42. WAIVER; PUBLIC POLICY. Any waiver by a consumer of the provision of this subchapter is contrary to public policy and is unenforceable and void.

"Sec. 17.43. CUMULATIVE REMEDIES. The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law.

"Sec. 17.44. CONSTRUCTION AND APPLICATION. This subchapter shall be liberally construed and applied to promote its underlying

1 purposes, which are to protect consumers against false, misleading,
2 and deceptive business practices, unconscionable actions, and
3 breaches of warranty, and to provide efficient and economical
4 procedures to secure such protection.

5 "Sec. 17.45. DEFINITIONS. As used in this subchapter:

6 "(1) 'Goods' means tangible chattels bought for use
7 primarily for personal, family, or household purposes, including
8 certificates or coupons exchangeable for such goods, and including
9 goods which, at the time of the sale or subsequently, are to be
10 affixed to real property as to become a part of the real property
11 whether or not severable.

12 "(2) 'Services' means work, labor, and services for
13 other than commercial or business use, including services furnished
14 in connection with the sale or repair of goods.

15 "(3) 'Person' means an individual, partnership,
16 corporation, association, or other group, however organized.

17 "(4) 'Consumer' means an individual who seeks or
18 acquires by purchase or lease, any goods or services for personal,
19 family, or household purposes.

20 "(5) 'Merchant' means a party to a consumer
21 transaction other than a consumer.

22 "(6) 'Trade' and 'commerce' mean the advertising,
23 offering for sale, sale, lease, or distribution of any good or
24 service, of any property, tangible or intangible, real, personal,
25 or mixed, and any other article, commodity, or thing of value,
26 wherever situated, and shall include any trade or commerce directly
27 or indirectly affecting the people of this state.

1 "(7) 'Documentary material' includes the original
2 or a copy of any book, record, report, memorandum, paper,
3 communication, tabulation, map, chart, photograph, mechanical
4 transcription, or other tangible document or recording, wherever
5 situated.

6 "(8) 'Consumer protection division' means the
7 antitrust and consumer protection division of the attorney
8 general's office.

9 "(9) 'Knowingly' means actual awareness of the falsity
10 or deception, but actual awareness may be inferred where objective
11 manifestations indicate that a person acted with actual awareness.

12 "Sec. 17.46. DECEPTIVE TRADE PRACTICES UNLAWFUL. (a)
13 False, misleading, or deceptive acts or practices in the conduct
14 of any trade or commerce are hereby declared unlawful.

15 "(b) The term 'false, misleading, or deceptive acts or
16 practices' includes, but is not limited to, the following acts:

17 "(1) passing off goods or services as those of
18 another;

19 "(2) causing confusion or misunderstanding as to the
20 source, sponsorship, approval, or certification of goods or
21 services;

22 "(3) causing confusion or misunderstanding as to
23 affiliations, connection, or association with, or certification
24 by, another;

25 "(4) using deceptive representations or designations
26 of geographic origin in connection with goods or services;

27 "(5) representing that goods or services have

1 sponsorship, approval, characteristics, ingredients, uses,
2 benefits, or quantities which they do not have or that a person
3 has a sponsorship, approval, status, affiliation, or connection
4 which he does not;

5 "(6) representing that goods are original or new if
6 they are deteriorated, reconditioned, reclaimed, used, or
7 secondhand;

8 "(7) representing that goods or services are of a
9 particular standard, quality, or grade, or that goods are of a
10 particular style or model, if they are of another;

11 "(8) disparaging the goods, services, or business
12 of another by false or misleading representation of facts;

13 "(9) advertising goods or services with intent not
14 to sell them as advertised;

15 "(10) advertising goods or services with intent not
16 to supply a reasonable expectable public demand, unless the
17 advertisements disclosed a limitation of quantity;

18 "(11) making false or misleading statements of fact
19 concerning the reasons for, existence of, or amount of price
20 reductions;

21 "(12) representing that an agreement confers or
22 involves rights, remedies, or obligations which it does not have
23 or involve, or which are prohibited by law;

24 "(13) knowingly making false or misleading statements
25 of fact concerning the need for parts, replacement, or repair
26 service;

27 "(14) misrepresenting the authority of a salesman,

1 representative or agent to negotiate the final terms of a consumer
2 transaction;

3 "(15) basing a charge for the repair of any item in
4 whole or in part on a guaranty or warranty instead of on the value
5 of the actual repairs made or work to be performed on the item
6 without stating separately the charges for the work and the charge
7 for the warranty or guaranty, if any;

8 "(16) disconnecting, turning back, or resetting the
9 odometer of any motor vehicle so as to reduce the number of miles
10 indicated on the odometer gauge;

11 "(17) advertising of any sale by fraudulently
12 representing that a person is going out of business;

13 "(18) using or employing a chain referral sales plan
14 in connection with the sale or offer to sell of goods, merchandise,
15 or anything of value, which uses a sales technique, plan,
16 arrangement, or agreement in which a buyer or prospective buyer
17 is offered the opportunity to purchase merchandise or goods and
18 in connection with the purchase receives the seller's promise or
19 representation that the buyer shall have the right to receive
20 compensation or consideration in any form for furnishing to the
21 seller the names of other prospective buyers;

22 "(19) representing that a guarantee or warranty
23 confers or involves rights or remedies which it does not have or
24 involve; or

25 "(20) acts or practices declared to be false,
26 misleading, or deceptive acts or practices by a regulation of the
27 consumer protection division under this subchapter.

1 "(c) It is the intent of the legislature that in construing
2 Subsection (a) of this section the courts to the extent possible
3 will be guided by Subsection (b) of this section and the
4 interpretations given by the Federal Trade Commission and federal
5 courts to Section 5(a)(1) of the Federal Trade Commission Act [15
6 U.S.C.A. 45(a)(1)].

7 "(d) The omission of a given act or practice from Subsection
8 (b) of this section or the failure of the consumer protection
9 division to issue a regulation regarding an act or practice, or
10 both, shall not limit the courts from determining that the act
11 or practice is unlawful under this subchapter.

12 "Sec. 17.47. REGULATIONS. (a) The consumer protection
13 division may issue, after hearing, regulations declaring other
14 acts or practices to be false, misleading, or deceptive acts or
15 practices. The regulations may not be in conflict with the rules,
16 regulations, and decisions issued by the Federal Trade Commission
17 and the federal courts in interpreting Section 5(a)(1) of the
18 Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)], as amended.

19 "(b) The consumer protection division shall:

20 "(1) publish a description of the organization of
21 the division, stating the general course and method of operation
22 of the division and the methods by which the public may obtain
23 information or make submissions or requests;

24 "(2) adopt and publish rules of practice setting
25 forth the nature and requirement of all formal and informal
26 procedures available, including a description of the forms and
27 instructions used by the division; and

1 "(3) make available for public inspection all
2 regulations, written statements of policy, and interpretations,
3 formulated, used, or adopted by the consumer protection division
4 in discharging its function under this subchapter.

5 "(c) Prior to the adoption, amendment, or repeal of a
6 regulation under this section, the consumer protection division
7 shall give notice of the time, date, and place of the hearing at
8 least 60 days prior to the date set for hearing. The notice shall
9 contain the statement of the terms or substance of the intended
10 action or a description of the subjects and issues involved and
11 the manner in which interested persons may present their views.
12 Notice shall be given in the same manner as required for meetings
13 of other governmental bodies and to any person requesting notice.
14 The consumer protection division may charge a reasonable fee to
15 cover the cost of mailing notices to persons requesting notices.

16 "(d) A petition may be submitted to the consumer protection
17 division to adopt, amend, or repeal a regulation. The petition
18 must be signed by 100 interested persons and supported by evidence
19 that a particular act or practice has been or could be false,
20 misleading, or deceptive to the consumer, or that an act or
21 practice declared to be false, misleading, or deceptive by a
22 regulation of the division is not in fact false, misleading, or
23 deceptive. Within 30 days after receipt of the petition the
24 consumer protection division must either deny the petition or
25 initiate hearing proceedings under this section. On denial of
26 the petition the consumer protection division must state the
27 reasons for the denial in writing.

1 "(e) The hearing shall be opened to the public and any
2 person may present testimony, data, or other information in writing
3 or orally to the consumer protection division regarding the acts
4 or practices under consideration.

5 "(f) A regulation issued under this section must be filed
6 with the secretary of state and becomes effective 30 days after
7 the date it is filed unless a later date is specified in the
8 regulation. The secretary of state shall keep a permanent register
9 of regulations issued under this section open to the public
10 inspection. The secretary of state shall furnish copies of
11 regulations filed under this section to persons requesting copies.
12 A fee may be charged not to exceed the cost of furnishing the
13 regulation.

14 "(g) A person aggrieved by the denial of the hearing under
15 Subsection (d) of this section or by the adoption, amendment, or
16 repeal of a regulation or failure to issue a regulation under
17 this section, may file a petition in a district court of Travis
18 County for a declaratory judgment on the validity or applicability
19 of a regulation adopted, amended, or repealed under this section
20 or on the denial of a hearing under Subsection (d) of this section.
21 The consumer protection division shall be made a party to the
22 action. In a suit under this subsection the district court may
23 issue injunctions, including temporary restraining orders, for
24 any appropriate purpose and the injunctions shall be issued without
25 bond and on the terms and conditions determined by the court.

26 "(h) The action of the consumer protection division in
27 adopting, amending, repealing, or failing to adopt a regulation

1 or denying of a hearing may be invalidated only if it is found
2 that it:

3 "(1) violates a constitutional or state statutory
4 provision;

5 "(2) exceeds the statutory authority of the consumer
6 protection division;

7 "(3) is arbitrary or capricious or characterized by
8 abuse of discretion or unwarranted exercise of discretion;

9 "(4) is so vague that it does not establish
10 sufficiently definite standards with which conduct can be
11 conformed;

12 "(5) is made on unlawful procedure; or

13 "(6) is clearly erroneous in view of the reliable,
14 probative, and substantial evidence in the whole record as
15 submitted.

16 "Sec. 17.48. RESTRAINING ORDERS. (a) Whenever the consumer
17 protection division has reason to believe that any person is
18 engaging in, has engaged in, or is about to engage in any act or
19 practice declared to be unlawful by this subchapter or by a
20 regulation issued under this subchapter, and that proceedings
21 would be in the public interest, the division may bring an action
22 in the name of the state against the person to restrain by
23 temporary or permanent injunction the use of such method, act,
24 or practice.

25 "(b) An action brought under Subsection (a) of this section
26 may be commenced in the district court of the county in which the
27 person against whom it is brought resides, has his principal place

1 of business, is doing business, or in the district court of the
2 county where the transaction occurred or any substantial portion
3 of the transaction occurred, or, on the consent of the parties,
4 in a district court of Travis County. The court may issue
5 temporary or permanent injunctions to restrain and prevent
6 violations of this subchapter or regulations issued under this
7 subchapter, and the injunctions shall be issued without bond.

8 "(c) In addition to the request for a temporary or permanent
9 injunction in a proceeding brought under Subsection (a) of this
10 section, the consumer protection division, on a finding by the
11 court that the defendant has engaged or is engaging in a practice
12 declared to be unlawful by this subchapter or by regulations
13 issued under this subchapter, may request a civil penalty of not
14 more than \$2,000 per violation not to exceed a total of \$10,000
15 to be paid to the state.

16 "(d) The court may make such additional orders or judgments
17 as are necessary to compensate identifiable persons for actual
18 damages or restoration of money or property, real or personal,
19 which may have been acquired by means of any act or practice
20 restrained. Damages may not include any damages incurred beyond
21 a point two years prior to the institution of the action by the
22 consumer protection division. Orders of the court may also include
23 the appointment of a receiver or a sequestration of assets on a
24 person who has been ordered by a court to make restitution under
25 this section has failed to do so within three months after the
26 order to make restitution has become final and nonappealable.

27 "(e) Any person who violates the terms of an injunction

1 under this section shall forfeit and pay to the state a civil
2 penalty of not more than \$10,000 per violation. In determining
3 whether or not an injunction has been violated the court shall
4 take into consideration the maintenance of procedures reasonably
5 adapted to insure compliance with the injunction. For the purposes
6 of this section, the district court issuing the injunction shall
7 retain jurisdiction, and the cause shall be continued, and in the
8 cases, the consumer protection division, or the district, county,
9 or city attorney with prior notice to the consumer protection
10 division, acting in the name of the state, may petition for
11 recovery of civil penalties under this section.

12 "(f) An order of the court awarding civil penalties under
13 Subsection (e) of this section applies only to violations of the
14 injunction incurred prior to the awarding of the penalty order.
15 Second or subsequent violations of an injunction issued under
16 this section are subject to the same penalties set out in
17 Subsection (e) of this section.

18 "Sec. 17.49. DUTY OF DISTRICT, COUNTY, AND CITY ATTORNEY.

19 (a) It is the duty of the district, county, and city attorneys
20 to lend to the consumer protection division any assistance
21 requested in the commencement and prosecutions of actions under
22 this subchapter.

23 "(b) A district, county, or city attorney, with prior
24 written notice to the consumer protection division, may institute
25 and prosecute actions seeking injunctive relief under this
26 subchapter. On request, the consumer protection division shall
27 assist the district, county, or city attorney in any action taken

1 under this subchapter. If an action is prosecuted by a district,
2 county, or city attorney alone, he shall make a full report to
3 the consumer protection division including the final disposition
4 of the matter.

5 "Sec. 17.50. EXEMPTIONS. (a) Nothing in this subchapter
6 shall apply to the owner or employees of a regularly published
7 newspaper, magazine, or telephone directory, or broadcast station,
8 or billboard, wherein any advertisement in violation of this
9 subchapter or regulations issued under this subchapter is published
10 or disseminated, unless it is established that the owner or
11 employees of the advertising medium have knowledge of the false,
12 deceptive, or misleading acts or practices declared to be unlawful
13 by this subchapter or regulations issued under this subchapter,
14 or had a direct or substantial financial interest in the sale or
15 distribution of the unlawfully advertised good or service.
16 Financial interest as used in this section relates to an
17 expectation which would be the direct result of such advertisement.

18 "(b) Nothing in this subchapter shall apply to acts or
19 practices authorized under specific rules or regulations
20 promulgated by the Federal Trade Commission under Section 5(a)(1)
21 of the Federal Trade Commission Act (15 U.S.C.A. 45(a)(1)). The
22 provisions of this subchapter do apply to any act or practice
23 prohibited or not specifically authorized by a rule or regulation
24 of the Federal Trade Commission. An act or practice is not
25 specifically authorized if no rule or regulation has been issued
26 on the act or practice.

27 "Sec. 17.51. CONFLICT OF LAWS. The determination that an

1 act or practice is false, misleading, or deceptive by this
2 subchapter or by a regulation of the consumer protection division
3 shall prevail over any other conflicting rule or regulation of
4 this state, to the extent of conflict only.

5 "Sec. 17.52. RELIEF FOR CONSUMERS. (a) A consumer may
6 maintain an action if he has been adversely affected by any of
7 the following:

8 "(1) the use or employment by any person of an act
9 or practice declared to be unlawful by Section 17.46 of this
10 subchapter or regulations issued under this subchapter;

11 "(2) a failure by any person to comply with an express
12 or implied warranty;

13 "(3) any unconscionable action or cause of action
14 by any person; or

15 "(4) a failure by any person to comply with the
16 provisions of Chapter 2, 3, 4, 5, or 7, Title 79, Revised Civil
17 Statutes of Texas, 1925, as amended (Articles 5069-2.01 et seq.,
18 Vernon's Texas Civil Statutes), or the rules or regulations
19 promulgated under these chapters.

20 "(b) In a suit filed under this section, each consumer who
21 prevails may obtain:

22 "(1) three times the amount of actual damages plus
23 court costs and attorneys' fees reasonable in relation to the
24 amount of work expended;

25 "(2) an order enjoining such acts or failure to act;

26 "(3) punitive damages;

27 "(4) orders necessary to restore to any party to the

1 suit any money or property, real or personal, which may have been
2 acquired in violation of this subchapter or regulations issued
3 under this subchapter; and

4 "(5) any other relief which the court deems proper,
5 including the appointment of a receiver or the revocation of a
6 license or certificate authorizing a person to engage in business
7 in this state if the judgment has not been satisfied within three
8 months of the date of the final judgment.

9 "(c) On a finding by the court that an action under this
10 section was groundless and brought in bad faith or for the purpose
11 of harassment, the court may award to the defendant reasonable
12 attorneys' fees in relation to the amount of work expended.

13 "Sec. 17.53. CLASS ACTIONS. (a) If a consumer has been
14 damaged by an unlawful method, act, or practice contained in
15 Subsection (b), Section 17.46 of this subchapter or by an act or
16 practice or type of act or practice previously declared unlawful,
17 deceptive, or unconscionable to the consumer by a final judgment
18 of an appellate court of proper jurisdiction and venue in this
19 state that was reported officially, the consumer protection
20 division or a consumer may bring an action on behalf of himself
21 and other consumers if the unlawful act or practice has caused
22 damage to the other consumers who are similarly situated, to
23 recover damages and relief as provided in this subchapter.

24 "(b) A plaintiff who prevails on a class action under this
25 subchapter may recover:

26 "(1) court costs and attorneys' fees reasonable in
27 relation to the amount of work expended in addition to actual

1 damages;

2 "(2) an order enjoining the act or failure to act;

3 "(3) punitive damages;

4 "(4) any orders which may be necessary to restore
5 to any party to the suit any money or property, real or personal,
6 which may have been acquired in violation of this subchapter; and

7 "(5) any other relief which the court deems proper
8 including the appointment of the receiver or revocation of a
9 license or certificate to engage in business in this state if the
10 judgment has not been satisfied within six months of the date of
11 issuance of the final judgment.

12 "(c) On a finding by the court that an action under this
13 section was brought in bad faith or for purposes of harassment,
14 the court may award to the defendant reasonable attorneys' fees
15 in relation to the work expended and costs.

16 "Sec. 17.54. CLASS ACTION: PROCEDURE. (a) The court
17 shall permit one or more members of a class to sue or be sued as
18 representative parties on behalf of the class only if:

19 "(1) the class is so numerous that joinder of all
20 members is impracticable;

21 "(2) there are questions of law or fact common to
22 the class;

23 "(3) the claims or defenses of the representative
24 parties are typical of the claims or defenses of the class; and

25 "(4) the representative parties will fairly and
26 adequately protect the interests of the class.

27 "(b) An action may be maintained as a class action if the

1 prerequisites of Subsection (a) of this section are satisfied and
2 in addition:

3 "(1) the prosecution of separate actions by or against
4 individual members of the class would create a risk of:

5 "(A) inconsistent or varying adjudications
6 with respect to individual members of the class which would
7 establish incompatible standards of conduct for the party opposing
8 the class; or

9 "(B) adjudications with respect to individual
10 members of the class which would as a practical matter be
11 dispositive of the interests of the other members not parties to
12 the adjudications or substantially impair or impede their ability
13 to protect their interests; or

14 "(2) the party opposing the class has acted or refused
15 to act on grounds generally applicable to the class, thereby
16 making appropriate final injunctive relief or corresponding
17 declaratory relief with respect to the class as a whole; or

18 "(3) the court finds that the questions of law or
19 fact common to the members of the class predominate over any
20 questions affecting only individual members, and that a class
21 action is superior to other available methods for the fair and
22 efficient adjudication of the controversy. The matters pertinent
23 to the findings include:

24 "(A) the interest of members of the class in
25 individually controlling the prosecution or defense of separate
26 actions;

27 "(B) the extent and nature of any litigation

1 concerning the controversy already commenced by or against members
2 of the class;

3 "(C) the desirability or undesirability of
4 controversy concentrating the litigation of the claims in the
5 particular forum; and

6 "(D) the difficulties likely to be encountered
7 in the management of a class action.

8 "(c) In construing this section, the courts of Texas shall
9 be guided by the decisions of the federal courts interpreting
10 Rule 23, Federal Rules of Civil Procedure.

11 "(d) As soon as practicable after the commencement of an
12 action brought as a class action, the court shall determine by
13 order whether it is to be maintained as a class action. An order
14 under this subsection may be altered or amended before a decision
15 on the merits. An order determining that the action may or may
16 not be brought as a class action is an interlocutory order which
17 is appealable and the procedures provided in Rule 385, Texas Rules
18 of Civil Procedure, apply.

19 "(e) If the action is permitted as a class action, the
20 court shall direct to the members of the class the best notice
21 practicable under the circumstances, including individual notice
22 to all members who can be identified through reasonable effort.

23 "(f) The notice shall contain a statement that:

24 "(1) the court will exclude the member notified from
25 the class if he so requests by a specified date;

26 "(2) the judgment, whether favorable or not, will
27 include all members who do not request exclusion; and

1 "(3) any member who does not request exclusion, if
2 he desires, may enter an appearance through counsel.

3 "(g) A class action may not be dismissed, settled, or
4 compromised without the approval of the court, and notice of the
5 proposed dismissal, settlement, or compromise shall be given to
6 all members of the class in such manner as the court directs.

7 "(h) When appropriate, an action may be brought or
8 maintained as a class action with respect to particular issues
9 or a class may be divided into subclasses and each subclass treated
10 as a class, and the provisions of this section shall be construed
11 and applied accordingly.

12 "(i) The judgment in a class action shall describe those
13 to whom the notice was directed and who have not requested
14 exclusion and those the court finds to be members of the class.
15 The court shall direct to the members of the class the best notice
16 practicable under the circumstances, including individual notice
17 to all members who can be identified through reasonable effort.

18 "(j) In the conduct of a class action the court may make
19 appropriate orders:

20 "(1) determining the course of proceedings or
21 prescribing measures to prevent undue repetition or complication
22 in the presentation of evidence or argument;

23 "(2) requiring, for the protection of the members
24 of the class or otherwise for the fair conduct of the action,
25 that notice be given in such manner as the court may direct to
26 some or all of the members or to the attorney general of any step
27 in the action, or of the proposed extent of the judgment, or of

1 the opportunity of members to signify whether they consider the
2 representation fair and adequate, to intervene and present claims
3 or defenses, or otherwise to come into the action;

4 "(3) imposing conditions on the representative parties
5 or on intervenors;

6 "(4) requiring that the pleadings be amended to
7 eliminate allegations as to representation of absent persons, and
8 that the action proceed accordingly; or

9 "(5) dealing with similar procedural matters.

10 "(k) The filing of a suit under this section tolls the
11 statute of limitations for bringing a suit by an individual under
12 Section 17.52 of this subchapter. An order of the court denying
13 the bringing of a suit as a class action does not affect the
14 ability of an individual to bring the same or a similar suit under
15 Section 17.52 of this subchapter.

16 "Sec. 17.55. PRELIMINARY NOTICE. (a) At least 30 days
17 prior to the commencement of a suit for damages under Section
18 17.53 of this subchapter, the consumer must notify the intended
19 defendant of his complaint and make demand that the defendant
20 provide relief to the consumer and others similarly situated.

21 "(b) The notice must be in writing and sent by certified
22 or registered mail, return receipt requested, to the place where
23 the transaction occurred, the intended defendants' principal place
24 of business in this state, or if neither will effect notice, to
25 the office of the Secretary of State of Texas.

26 "(c) An action for injunctive relief under Section 17.53
27 of this subchapter may be commenced without compliance with

1 Subsection (a) of this section. Not less than 30 days after the
2 commencement of an action for injunctive relief, and after
3 compliance with the provisions of Subsection (a) of this section,
4 the consumer may amend his complaint without leave of court to
5 include a request for damages.

6 "(d) No damages may be awarded if:

7 "(1) within 30 days of receipt of the notice and
8 demand the defendant notifies the consumer by certified or
9 registered mail, return receipt requested, that he will provide
10 relief to the consumer and others similarly situated and furnishes
11 his plan for providing the relief; and

12 "(2) the consumer notifies the defendant that the
13 plan is acceptable.

14 "Sec. 17.56. DAMAGES: DEFENSE. No award of damages may
15 be given in any action filed under Section 17.53 of this subchapter
16 if the defendant:

17 "(1) proves that the action complained of resulted
18 from a bona fide error notwithstanding the use of reasonable
19 procedures adopted to avoid any error; and

20 "(2) made restitution of any consideration received
21 from any member of the class.

22 "Sec. 17.57. PROMOTIONAL MATERIAL. If damages or civil
23 penalties are assessed against the seller of goods or services
24 for advertisements or promotional material in a suit filed under
25 Section 17.48, 17.49, 17.52, or 17.53 of this subchapter, the
26 seller of the goods or services has a cause of action against a
27 third party for the amount of damages or civil penalties assessed

1 against the seller plus attorneys' fees on a showing that:

2 "(1) the seller received the advertisements or
3 promotional material from the third party;

4 "(2) the seller's only action with regard to the
5 advertisements or promotional material was to disseminate the
6 material; and

7 "(3) the seller has ceased disseminating the material.

8 "Sec. 17.58. VENUE. An action brought under Section 17.52
9 or 17.53 of this subchapter may be commenced in the county in
10 which the person against whom the suit is brought resides, has
11 his principal place of business, or is doing business.

12 "Sec. 17.59. SUBPOENAS. The clerk of a district court at
13 the request of any party to a suit pending in his court which is
14 brought under this subchapter shall issue a subpoena for any
15 witness or witnesses who may be represented to reside within 100
16 miles of the courthouse of the county in which the suit is pending
17 or who may be found within such distance at the time of trial.
18 The clerk shall issue a separate subpoena and a copy thereof for
19 each witness subpoenaed. When an action is pending in Travis
20 County on the consent of the parties a subpoena may be issued for
21 any witness or witnesses who may be represented to reside within
22 100 miles of the courthouse of a county in which the suit could
23 otherwise have been brought or who may be found within such
24 distance at the time of the trial.

25 "Sec. 17.60. VOLUNTARY COMPLIANCE. (a) In the
26 administration of this subchapter the consumer protection division
27 may accept assurances of voluntary compliance with respect to any

1 act or practice which violates this subchapter or regulations
2 issued under this subchapter from any person who is engaging in,
3 has engaged in, or is about to engage in the act or practice.
4 The assurance shall be in writing and shall be filed with and
5 subject to the approval of the district court in the county in
6 which the alleged violator resides or does business, or in the
7 district court of Travis County.

8 "(b) The acceptance of an assurance of voluntary compliance
9 may be conditioned on the stipulation that the person in violation
10 of this subchapter or regulations issued under this subchapter
11 restore to any person in interest any money or property, real or
12 personal, which may have been acquired by means of acts or
13 practices which violate this subchapter or regulations issued
14 under this subchapter.

15 "(c) An assurance of voluntary compliance shall not be
16 considered an admission of prior violation of this subtitle.
17 However, unless an assurance has been rescinded by agreement of
18 the parties or voided by a court for good cause, subsequent failure
19 to comply with the terms of an assurance is prima facie evidence
20 of a violation of this subchapter.

21 "(d) Matters closed by the filing of an assurance of
22 voluntary compliance may be reopened at any time. Assurances of
23 voluntary compliance shall in no way affect individual rights of
24 action under this subchapter, except that the rights of individuals
25 with regard to money or property received pursuant to a stipulation
26 in the voluntary compliance under Subsection (b) of this section
27 are governed by the terms of the voluntary compliance.

1 "Sec. 17.61. POWERS OF RECEIVER. (a) When a receiver is
2 appointed by the court under this subchapter, he shall have the
3 power to sue for, collect, receive, and take into his possession
4 all the goods and chattels, rights and credits, money, and effects,
5 lands, tenements, books, records, documents, papers, choses in
6 action, bills, notes, and property of every description, derived
7 by means of any practice declared to be illegal and prohibited
8 by this subchapter, including property with which such property
9 has been mingled if it cannot be identified in kind because of
10 the commingling, and to sell, convey, and assign the property and
11 hold and dispose of the proceeds under the direction of the court.
12 Any person who has suffered damages as a result of use or
13 employment of any unlawful practices and submits proof to the
14 satisfaction of the court that he has in fact been damaged, may
15 participate with general creditors in the distribution of the
16 assets to the extent he has sustained out-of-pocket losses. In
17 the case of a partnership or business entity, the receiver shall
18 settle the estate and distribute the assets under the direction
19 of the court. The court shall have jurisdiction of all questions
20 arising in the proceedings and may make any orders or judgments
21 required.

22 "(b) If the claims of consumers remain unsatisfied after
23 distribution of the assets, the court may order that all persons
24 who knowingly participated in the unlawful enterprise be held
25 jointly and severally liable to the extent of the unsatisfied
26 consumer claims if such person:

27 "(1) contributed substantial personal services,

1 money, credit, real, personal, or mixed property, or any other
2 thing of substantial value with the expectation of sharing in the
3 profits of the enterprise; and

4 "(2) had knowledge or should have had knowledge of
5 the unlawful purpose of the enterprise at the time such things
6 of value were contributed, or freely continued in the association
7 or other relationship after gaining knowledge of the unlawful
8 purpose of the enterprise.

9 "Sec. 17.62. REPORTS AND EXAMINATIONS. Whenever the
10 consumer protection division has reason to believe that a person
11 is engaging in, has engaged in, or is about to engage in any act
12 or practice declared to be unlawful by this subchapter or by
13 regulations issued under this subchapter, or when it reasonably
14 believes it to be in the public interest to conduct an
15 investigation to ascertain whether any person is engaging in, has
16 engaged in, or is about to engage in any such act or practice,
17 an authorized member of the division may:

18 "(1) require the person to file on the prescribed
19 forms a statement or report in writing, under oath or otherwise,
20 as to all the facts and circumstances concerning the alleged
21 violation and such other data and information as the consumer
22 protection division deems necessary;

23 "(2) examine under oath any person in connection
24 with this alleged violation;

25 "(3) examine any merchandise or sample of merchandise
26 deemed necessary and proper; and

27 "(4) pursuant to an order of the appropriate court,

1 impound any sample of merchandise that is produced in accordance
2 with this subchapter and retain it in the possession of the
3 division under the completion of all proceedings in connection
4 with which the merchandise is produced.

5 "Sec. 17.63. CIVIL INVESTIGATIVE DEMAND. (a) Whenever
6 the consumer protection division believes that any person may be
7 in possession, custody, or control of the original copy of any
8 documentary material relevant to the subject matter of an
9 investigation of a possible violation of this subchapter, an
10 authorized agent of the division may execute in writing and serve
11 on the person a civil investigative demand requiring the person
12 to produce the documentary material and permit inspection and
13 copying.

14 "(b) Each demand shall:

15 "(1) state the statute and section under which the
16 alleged violation is being investigated, and the general subject
17 matter of the investigation;

18 "(2) describe the class or classes of documentary
19 material to be produced with reasonable specificity so as to
20 fairly indicate the material demanded;

21 "(3) prescribe a return date within which the
22 documentary material is to be produced; and

23 "(4) identify the members of the consumer protection
24 division to whom the documentary material is to be made available
25 for inspection and copying.

26 "(c) A civil investigative demand may contain a requirement
27 or disclosure of documentary material which would be discoverable

1 under Rule 26 of the Federal Rules of Civil Procedure.

2 "(d) Service of any demand may be made by:

3 "(1) delivering a duly executed copy of the demand
4 to the person to be served or to a partner or to any officer or
5 agent authorized by appointment or by law to receive service of
6 process on behalf of that person;

7 "(2) delivering a duly executed copy of the demand
8 to the principal place of business in the state of the person to
9 be served;

10 "(3) mailing by registered mail or certified mail
11 a duly executed copy of the demand addressed to the person to be
12 served at the principal place of business in this state, or if
13 the person has no place of business in this state, to his principal
14 office or place of business.

15 "(e) Documentary material demanded pursuant to this section
16 shall be produced for inspection and copying during normal business
17 hours at the principal office or place of business of the person
18 served, or at other times and place as may be agreed on by the
19 person served and the consumer protection division.

20 "(f) No documentary material produced pursuant to a demand
21 under this section, unless otherwise ordered by a court for good
22 cause shown, shall be produced for inspection or copying by, nor
23 shall its contents be disclosed to any person other than the
24 authorized employee of the consumer protection division without
25 the consent of the person who produced the material. The consumer
26 protection division shall prescribe reasonable terms and conditions
27 allowing the documentary material to be available for inspection

1 and copying by the person who produced the material or any duly
2 authorized representative of that person. The consumer protection
3 division may use the documentary material or copies of it as it
4 determines necessary in the enforcement of this subchapter,
5 including presentation before any court. Any material which
6 contains trade secrets shall not be presented except with the
7 approval of the court in which the action is pending after adequate
8 notice to the person furnishing the material.

9 "(g) At any time before the return date specified in the
10 demand, or within 20 days after the demand has been served,
11 whichever period is shorter, a petition to extend the return date
12 for, or to codify or set aside the demand, stating good cause,
13 may be filed in the district court in the county where the parties
14 reside, or a district court of Travis County.

15 "(h) A person on whom a demand is served under this section
16 shall comply with the terms of the demand unless otherwise provided
17 by a court order.

18 "(i) Personal service of a similar investigative demand
19 under this section may be made on any person outside of this state
20 if the person has engaged in conduct in violation of this
21 subchapter. Such persons shall be deemed to have submitted
22 themselves to the jurisdiction of this state within the meaning
23 of this section.

24 "Sec. 17.64. PENALTIES. (a) Any person who, with intent
25 to avoid, evade, or prevent compliance, in whole or in part, with
26 Section 17.62 or 17.63 of this subchapter, removes from any place,
27 conceals, withholds, or destroys, mutilates, alters, or by any

1 other means falsifies any documentary material or merchandise or
2 sample of merchandise is guilty of a misdemeanor and on conviction
3 is punishable by a fine of not more than \$5,000 or by confinement
4 in the county jail for not more than one year, or both.

5 "(b) If a person fails to comply with a directive of the
6 consumer protection division under Section 17.62 of this subchapter
7 or with a civil investigative demand for documentary material
8 served on him under Section 17.63 of this subchapter, or if
9 satisfactory copying or reproduction of the material cannot be
10 done and the person refuses to surrender the material, the consumer
11 protection division may file in the district court in the county
12 in which the person resides, is found, or transacts business, and
13 serve on the person, a petition for an order of the court for
14 enforcement of Sections 17.62 and 17.63 of this subchapter. If
15 the person transacts business in more than one county, the petition
16 shall be filed in the county in which the person maintains his
17 principal place of business, or in another county agreed on by
18 the parties to the petition.

19 "(c) When a petition is filed in the district court in any
20 county under this section, the court shall have jurisdiction to
21 hear and determine the matter presented and to enter any order
22 required to carry into effect the provisions of Sections 17.62
23 and 17.63 of this subchapter. Any final order entered is subject
24 to appeal to the Texas Supreme Court. Failure to comply with any
25 final order entered under this section is punishable by contempt."

26 Sec. 2. Chapter 10, Title 79, Revised Civil Statutes of
27 Texas, 1925, as amended (Article 5069-10.01 et seq., Vernon's

1 Texas Civil Statutes), is repealed.

2 Sec. 3. If any provision of this Act or the application
3 thereof to any person or circumstances is held invalid, such
4 invalidity shall not affect other provisions or applications of
5 the Act which can be given effect without the invalid provision
6 or application, and to this end the provisions of this Act are
7 declared to be severable.

8 Sec. 4. The importance of this legislation and the crowded
9 condition of the calendars in both houses create an emergency and
10 an imperative public necessity that the constitutional rule
11 requiring bills to be read on three several days in each house
12 be suspended, and this rule is hereby suspended, and that this
13 Act take effect and be in force from and after its passage, and
14 it is so enacted.

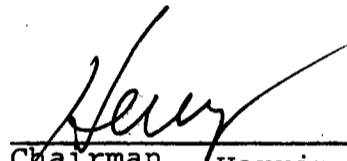
Austin, Texas

April 10, 1973

Honorable William P. Hobby
President of the Senate

Sir:

We, your Committee on Jurisprudence,
to which was referred S. B. No. 75, have had the same under
consideration, and I am instructed to report it back to the Senate
with the recommendation that it do not pass, but that the
Committee Substitute adopted in lieu thereof do pass and be
printed.



Chairman Herring

CAS

D

COMMITTEE SUBSTITUTE FOR S.B. 75

A BILL TO BE ENTITLED

AN ACT

relating to the definition and regulation of unlawful trade, acts and practices, the protection of Texas consumers, and providing for consumer remedies; amending Chapter 17, Business & Commerce Code, as amended, by adding Subchapter E; repealing Chapter 10, Title 79, Revised Civil Statutes of Texas, 1925, as amended (Articles 5069-10.01 et seq., Vernon's Texas Civil Statutes); amending Sections 13 and 7 Article 21.21, Insurance Code, and adding new Sections 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24; and declaring an emergency.

as
amended

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. Chapter 17, Business & Commerce Code, as amended, is amended by adding Subchapter E to read as follows:

SUBCHAPTER E. DECEPTIVE TRADE PRACTICES AND
CONSUMER REMEDIES

"Sec. 17.41. SHORT TITLE. This subchapter may be cited as the Deceptive Trade Practices-Consumer Remedies Act.

"Sec. 17.42. WAIVERS: PUBLIC POLICY. Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void.

"Sec. 17.43. CUMULATIVE REMEDIES. The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law. The provisions of this subchapter do not in any way preclude other political subdivisions of this state from dealing with deceptive trade practices.

"Sec. 17.44. CONSTRUCTION AND APPLICATION. This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.

"Sec. 17.45. DEFINITIONS. As used in this subchapter:

"(1). "Goods" means tangible chattels bought for use, primarily for personal, family, or household purposes, including certificates or coupons exchangeable for such goods, and including goods which, at the time of the sale or subsequently, are to be affixed to real property as to become a part of the real property whether or not severable.

"(2). "Services" means work, labor, and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods.

"(3) "Person" means an individual, partnership, corporation, association, or other group, however organized.

"(4) "Consumer" means an individual who seeks or acquires by purchase or lease, any goods or services, for personal, family, or household purposes.

"(5) "Merchant" means a party to a consumer transaction other than a consumer.

"(6) "Trade" and "commerce" mean the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.

"(7) "Documentary material" includes the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situated.

"(8) "Consumer protection division" means the antitrust and consumer protection division of the attorney general's office.

"(9) "Knowingly" means actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

"Sec 17.46. DECEPTIVE TRADE PRACTICES UNLAWFUL. (a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

"(b) The term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

"(1) passing off goods or services as those of another;

"(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

"(3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;

"(4) using deceptive representations or designations of geographic origin in connection with goods or services;

"(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

"(6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

"(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

"(8) disparaging the goods, services, or business of another by false or misleading representation of facts;

"(9) advertising goods or services with intent not to sell them as advertised;

"(10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;

"(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

"(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

"(13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;

"(14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

"(15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any;

"(16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer

language;

"(17) advertising of any sale by fraudulently representing that a person is going out of business;

"(18) using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller's promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if receipt of the compensation or consideration is contingent upon the occurrence²⁰/of an event subsequent to the time the buyer purchases the merchandise or goods; ~~off~~

"(19) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 of the Business and ~~and~~ ^{\$} Commerce Code to involve obligations in excess of those which are appropriate to the goods; *or*

"(20) insert 10
"(c) It is the intent of the legislature that in construing Subsection (a) of this section the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a) (1) of the Federal Trade Commission Act [15 U.S.C.A. 45 (a) (1)].

"Sec¹⁷ 17.47. RESTRAINING ORDERS. (a) Whenever the consumer protection division has reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this subchapter, and that proceedings would be in the public interest, the division may bring an action in the name of the state against the person to restrain by temporary or permanent injunction the use of such method, act, or practice.

The consumer protection division may bring any action under this section against a licensed insurer or insurance agent for a violation of this subchapter, Article 21.21, Texas Insurance Code, or the rules and regulations of the State Board of Insurance issued under Article 21.21, Texas Insurance Code, only on the written request of the State Board of Insurance or the Commissioner of Insurance.

" Nothing herein shall require the consumer protection division to notify such person that court action is or may be under consideration. Provided, however, the consumer protection division shall, at least 7 days prior to instituting such court action, contact such person to inform him in general of the alleged unlawful conduct. Cessation of unlawful conduct after such prior contact shall not render such court action moot under any circumstances, and such injunctive relief shall lie even if such person has ceased such unlawful conduct after such prior contact. Such prior contact shall not be required if, in the opinion of the consumer protection division, there is good cause to believe that such person would evade service of process if prior contact were made or that such person would destroy relevant records if prior contact were made.

' (b) An action brought under Subsection (a) of this section may be commenced in the district court of the county in which the person against whom it is brought resides, has his principal place of business, is doing business, or in the district court of the county where the transaction occurred, or, on the consent of the parties, in a district court of Travis County. The court may issue temporary or permanent injunctions to restrain and prevent violations of this subchapter and the injunctions shall be issued without bond.

' (c) In addition to the request for a temporary or permanent injunction in a proceeding brought under Subsection (a) of this section, the consumer protection division, on a finding by the court that the defendant has engaged or is engaging in a practice declared to be unlawful by this subchapter, may request a civil penalty of not more than \$2,000 per violation, not to exceed a total of \$10,000, to be paid to the state.

1'(d) The court may make such additional orders or judgments as are necessary to compensate identifiable persons for actual damages or restoration of money or property, real or personal, which may have been acquired by means of any act or practice restrained. Damages may not include any damages incurred beyond a point two years prior to the institution of the action by the consumer protection division. Orders of the court may also include the appointment of a receiver or a sequestration of assets on a person who has been ordered by a court to make restitution under this section has failed to do so within three months after the order to make restitution has become final and nonappealable.

1'(e) Any person who violates the terms of an injunction under this section shall forfeit and pay to the state a civil penalty of not more than \$10,000 per violation, not to exceed \$50,000. In determining whether or not an injunction has been violated the court shall take into consideration the maintenance of procedures reasonably adapted to insure compliance with the injunction. For the purposes of this section, the district court issuing the injunction shall retain jurisdiction, and the cause shall be continued, and in these cases, the consumer protection division, or the district or county attorney with prior notice to the consumer protection division, acting in the name of the state, may petition for recovery of civil penalties under this section.

1'(f) An order of the court awarding civil penalties under Subsection (e) of this section applies only to violations of the injunction incurred prior to the awarding of the penalty order. Second or subsequent violations of an injunction issued under this section are subject to the same penalties set out in Subsection (e) of this section.

1'Sec. 17.48. DUTY OF DISTRICT AND COUNTY ATTORNEY. (a) It is the duty of the district and county attorneys to lend to the consumer protection division any assistance requested in the commencement and prosecutions of action under this subchapter.

"(b) A district or county attorney, with prior written notice to the consumer protection division, may institute and prosecute actions seeking injunctive relief under this subchapter, after complying with the prior contact provisions of Sub-section (a) of Section 17.47 of this subchapter. On request, the consumer protection division shall assist the district or county attorney in any action taken under this subchapter. If an action is prosecuted by a district or county attorney alone, he shall make a full report to the consumer protection division including the final disposition of the matter. No district or county attorney may bring an action under this section against any licensed insurer or licensed insurance agent transacting business under the authority and jurisdiction of the State Board of Insurance unless first requested in writing to do so by the State Board of Insurance, the Commissioner of Insurance, or the consumer protection division pursuant to a request by the State Board of Insurance or Commissioner of Insurance.

"Sec 17.49. EXEMPTIONS. (a) Nothing in this subchapter shall apply to the owner or employees of a regularly published newspaper, magazine, or telephone directory, or broadcast station, or billboard, wherein any advertisement in violation of this subchapter or regulations issued under this subchapter is published or disseminated, unless it is established that the owner or employees of the advertising medium have knowledge of the false, deceptive, or misleading acts or practices declared to be unlawful by this subchapter or regulations issued under this subchapter, or had a direct or substantial financial interest in the sale or distribution of the unlawfully advertised good or service. Financial interest as used in this section relates to an expectation which would be the direct result of such advertisement.

"(b) Nothing in this subchapter shall apply to acts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission under Section 5 (a)(1) of the Federal Trade Commission Act (15 U.S.C.A. 45(a) (1)). The provisions of this subchapter do apply to any act or practice prohibited or not specifically authorized by a rule or regulation of the Federal Trade Commission. An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice.

^{Two}Sec. 17.50. RELIEF FOR CONSUMERS. (a) A consumer may maintain an action if he has been adversely affected by any of the following:

"(1) the use or employment by any person of an act or practice declared to be unlawful by Section 17.46 of this subchapter;

"(2) a failure by any person to comply with an express or implied warranty;

"(3) any unconscionable action or course of action by any person; or

"(4) the use or employment by any person of an act or practice in violation of Article 21.21, Texas Insurance Code, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code.

"(b) In a suit filed under this section, each consumer who prevails may obtain:

"(1) three times the amount of actual damages plus court costs and attorneys' fees reasonable in relation to the amount of work expended;

"(2) an order enjoining such acts or failure to act;

~~"(3) punitive damages;~~

"(3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and

"(4) any other relief which the court deems proper, including the appointment of a receiver or the revocation of a license or certificate authorizing a person to engage in business in this state if the judgment has not been satisfied within three months of the date of the final judgment. The court may not revoke or suspend a license to do business in this state or appoint a receiver to take over the affairs of a person who has failed to satisfy a judgment if the person is a licensee of or regulated by a state agency which has statutory authority to revoke or suspend a license or to appoint a receiver or trustee.

"(c) On a finding by the court that an action under this section was groundless and brought in bad faith or for the purpose of harassment, the court may award to the defendant reasonable attorneys' fees in relation to the amount of work expended, ^{and} court costs, ~~and punitive damages.~~

^{tion}Sec. 17.51. CLASS ACTIONS. (a) If a consumer has been damaged in an amount in excess of \$10,000 by an unlawful method, act, or practice contained in Subsection (b) ^{of} Section 17.46 of this subchapter, an act or practice in violation of Article 21.21, Texas Insurance Code, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code, ^{as amended, Ins. C. 2} a consumer may bring an action on behalf of himself and other consumers if the unlawful act or practice has caused damage to the other consumers who are similarly situated, to recover damages and relief as provided in this subchapter.

"(b) A plaintiff who prevails on a class action under this subchapter may recover:

"(1) court costs and attorneys' fees reasonable in relation to the amount of work expended in addition to actual damages;

"(2) an order enjoining the act or failure to act;

~~"(3) punitive damages;~~

"(3) any orders which may be necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and

"(4) any other relief which the court deems proper including the appointment of a receiver or revocation of a license or certificate to engage in business in this state if the judgment has not been satisfied within six months of the date of issuance of the final judgment. The court may not revoke or suspend a license to do business in this state or appoint a receiver to take over the affairs of a person who has failed to satisfy a judgment if the person is a licensee of or regulated by a state agency which has statutory authority to revoke or suspend a license or to appoint a receiver or trustee.

"(c) On a finding by the court that an action under this section was brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorneys' fees in relation to the work expended, ^{and} court costs, ~~and~~ ~~punitive damages.~~

"(d) An action under this section may not be maintained or shall be stayed if proceedings regarding an administrative class action under Section 14, ~~of~~ Article 21.21, Insurance Code, have been initiated regarding the same acts or practices and the same defendant in the action under this section.

^{Two}
"Sec 17.52. CLASS ACTION: PROCEDURE. (a) The court shall permit

one or more members of a class to sue or be sued as representative parties on behalf of the class only if:

"(1) the class is so numerous that joinder of all members is impracticable;

"(2) there are questions of law or fact common to the class;

"(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

"(4) the representative parties will fairly and adequately protect the interests of the class.

"(b) An action may be maintained as a class action if the prerequisites of Subsection (a) of this section are satisfied and in addition;

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

"(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

"(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

"(C) the desirability or undesirability of controversy concentrating the litigation of the claims in the particular forum; and

"(D) the difficulties likely to be encountered in the management of a class action.

"(c) In construing this section, the courts of Texas shall be guided by the decisions of the federal courts interpreting Rule 23, Federal Rules of Civil Procedure.

"(d) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained as a class action. An order under this subsection may be altered or amended before a decision on the merits. An order determining that the action may or may not be brought as a class action is an interlocutory order which is appealable and the procedures provided in Rule 385, Texas Rules of Civil Procedure, apply.

"(e) If the action is permitted as a class action, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

"(f) The notice shall contain a statement that:

"(1) the court will exclude the member notified from the class if he so requests by a specified date;

"(2) the judgment, whether favorable or not, will include all members who do not request exclusion; and

"(3) any member who does not request exclusion, if he desires, may enter an appearance through counsel.

"(g) A class action may not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given to all members of the class in such manner as the court directs.

"(h) When appropriate, an action may be brought or maintained as a class action with respect to particular issues or a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall be construed and applied accordingly.

"(i) The judgment in a class action shall describe those to whom the notice was directed and who have not requested exclusion and those the court finds to be members of the class. The court shall direct to the members of the class the best notice practicable under the ⁱcircumstances, including individual notice to all members who can be identified through reasonable effort.

"(j) In the conduct of a class action the court may make appropriate orders:

"(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication/in the presentation of evidence or argument;

"(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members or to the attorney general of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

"(3) imposing conditions on the representative parties or on intervenors;

"(4) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; or

"(5) dealing with similar procedural matters.

"(k) The filing of a suit under this section tolls the statute of limitations for bringing a suit by an individual under Section 17.50 of this subchapter. An order of the court denying the bringing of a suit as a class action does not affect the ability of an individual to bring the same or a similar suit under Section 17.50 of this subchapter.

"Sec^{Dev} 17.53. PRELIMINARY NOTICE. (a) At least 30 days prior to the commencement of a suit for damages under Section 17.51 of this subchapter, the consumer must notify the intended defendant of his complaint and make demand that the defendant provide relief to the consumer and others similarly situated.

"(b) The notice must be in writing and sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, the intended defendants' principal place of business in this state, or if neither will effect notice, to the office of the Secretary of State of Texas.

"(c) An action for injunctive relief under Section 17.51 of this subchapter may be commenced without compliance with Subsection (a) of this section. Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with the provisions of Subsection (a) of this section, the consumer may amend his complaint without leave of court to include a request for damages.

"(d) No damages may be awarded to a consumer class under this section if within 30 days of receipt of the notice the intended defendant furnished the consumer, by certified or registered mail, return receipt requested, a written offer of settlement. The offer of settlement must include a statement that:

"(1) all consumers similarly situated have been adequately identified or a reasonable effort to identify such other consumers has been made, and a description of the class so identified and the method employed to identify them;

"(2) all consumers so identified have been notified that upon their request the intended defendant will provide relief to the consumer and all others similarly situated, and a complete explanation of the relief being afforded and a copy of the notice/or communication which the intended defendant is providing to the members of the class;

"(3) the relief being afforded the consumer has been, or if said offer is accepted by the consumer, will be given within a stated reasonable period of time; and

"(4) the practice complained of has ceased.

"(e) Attempts to comply with the provisions of this section by a person receiving a demand shall be an offer to compromise and shall be inadmissible as evidence. Attempts to comply with a demand shall not be considered an admission of engaging in an unlawful act or practice. Evidence of compliance or attempts to comply with the provisions of this section may be introduced by a defendant for the purpose of establishing good faith or to show compliance with the provisions of this section.

"Sec^{tion} 17.54. DAMAGES: DEFENSE. No award of damages may be given in any action filed under Section 17.51 of this subchapter if the defendant:

'(1) proves that the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any error; and

'(2) made restitution of any consideration received from any member of the class.

"Sec^{tion} 17.55. PROMOTIONAL MATERIAL. If damages or civil penalties are assessed against the seller of goods or services for advertisements or promotional material in a suit filed under Section 17.47, 17.48, 17.50, or 17.51 of this subchapter, the/seller of the goods or services has a cause of action against a third party for the amount of damages or civil penalties assessed against the seller plus attorneys' fees on a showing that:

'(1) the seller received the advertisements or promotional material from the third party;

'(2) the seller's only action with regard to the advertisements or promotional material was to disseminate the material; and

'(3) the seller has ceased disseminating the material.

"Sec^{tion} 17.56. VENUE. An action brought under Section 17.50 or 17.51 of this suchapter may be commenced in the county in which the person against whom the suit is brought resides, has his principal place of business, or is doing business.

"Sec^{tion} 17.57. SUBPOENAS. The clerk of a district court at the request of any party to a suit pending in his court which is brought under this subchapter shall issue a subpoena for any witness or witnesses who may be represented to reside within 100 miles of the courthouse of the county in which the suit is pending or who may be found within such distance at the time of trial. The clerk shall issue a separate subpoena and a copy thereof for each witness subpoenaed. When an action is pending in Travis County on the consent of the parties a subpoena may be issued for any witness or witnesses who may be represented to reside within 100 miles of the courthouse of a county in which the suit could otherwise have been brought or who may be found within such distance at the time of the trial.

"Sec^{tion} 17.58. VOLUNTARY COMPLIANCE. (a) In the administration of this subchapter the consumer protection division may accept assurance of voluntary compliance with respect to any act or practice which violates this subchapter from any person who is engaging in, has engaged in, or is about to engage in the act or practice. The assurance shall be in writing and shall be filed with and subject to the approval of the district court in the county in which the alleged violator resides or does business or in the district court of Travis County.

"(b) The acceptance of an assurance of voluntary compliance may be conditioned on the stipulation that the person in violation of this subchapter restore to any person in interest any money or property, real or personal, which may have been acquired by means of acts or practices which violate this subchapter.

"(c) An assurance of voluntary compliance shall not be considered an admission of prior violation of this subchapter. However, unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this subchapter.

"(d) Matters closed by the filing of an assurance of voluntary compliance may be reopened at any time. Assurances of voluntary compliance shall in no way affect individual rights of action under this subchapter, except that the rights of individuals with regard to money or property received pursuant to a stipulation in the voluntary compliance under Subsection (b) of this section are governed by the terms of the voluntary compliance.

"Sec^{17.59} POWERS OF RECEIVER. (a) When a receiver is appointed by the court under this subchapter, he shall have the power to sue for, collect, receive, and take into his possession all the goods and chattels, rights and credits, money, and effects, lands, tenements, books, records, documents, papers, choses in action, bills, notes, and property of every description, derived by means of any practice declared to be illegal and prohibited by this subchapter, including property with which such property has been mingled if it cannot be identified in kind because of the commingling, and to sell, convey, and assign the property and hold and dispose of the proceeds under the direction of the court. Any person who has suffered damages as a result of use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in the proceedings and may make any orders or judgments required.

"(b) If the claims of consumers remain unsatisfied after distribution of the assets, the court may order that all persons who knowingly participated in the unlawful enterprise be held jointly and severally liable to the extent of the unsatisfied/consumer claims if such person:

"(1) contributed substantial personal services, money, credit, real, personal, or mixed property, or any other thing of substantial value with the expectation of sharing in the profits of the enterprise; and

"(2) had knowledge or should have had knowledge of the unlawful purpose of the enterprise at the time such things of value were contributed, or freely continued in the association or other relationship after gaining knowledge of the unlawful purpose of the enterprise.

"Sec^{17.60} 17.60 REPORTS AND EXAMINATIONS. Whenever the consumer protection division has reason to believe that a person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this subchapter, or when it reasonably believes it to be in the public interest to conduct an investigation to ascertain whether any person is engaging in, has engaged in, or is about to engage in any such act or practice, an authorized member of the division may:

"(1) require the person to file on the prescribed forms a statement or report in writing, under oath or otherwise, as to all the facts and circumstances concerning the alleged violation and such other data and information as the consumer protection division deems necessary;

"(2) examine under oath any person in connection with this alleged violation;

"(3) examine any merchandise or sample of merchandise ^{17.60} deemed necessary and proper; and

"(4) pursuant to an order of the appropriate court, impound any sample of merchandise that is produced in accordance with this subchapter and retain it in the possession of the division until the completion of all proceedings in connection with which the merchandise is produced.

"This section shall not apply to licensed insurers or licensed insurance agents transacting an insurance business in this state under the authority and jurisdiction of the State Board of Insurance unless the State Board of Insurance or the Insurance Commissioner has requested in writing that the consumer protection division file an action under Section 17.47 of this subchapter.

^{17.61}Sec. 17.61. CIVIL INVESTIGATIVE DEMAND. (a) Whenever the consumer protection division believes that any person may be in possession, custody, or control of the original copy of any documentary material relevant to the subject matter of an investigation of a possible violation of this subchapter, an authorized agent of the division may execute in writing and serve on the person a civil investigative demand requiring the person to produce the documentary material and permit inspection and copying. This section shall not apply to licensed insurers or licensed insurance agents transacting an insurance business in this state under the authority and jurisdiction of the State Board of Insurance unless the State Board of Insurance or the Insurance Commissioner has requested in writing that the consumer protection division file an action under Section 17.47 of this subchapter.

"(b) Each demand shall:

"(1) state the statute and section under which the alleged violation is being investigated, and the general subject matter of the investigation;

"(2) describe the class or classes of documentary material to be produced with reasonable specificity so as to fairly indicate the material demanded;

"(3) prescribe a return date within which the documentary material is to be produced; and

"(4) identify the members of the consumer protection division to whom the documentary material is to be made available for inspection and copying.

"(c) A civil investigative demand may contain a requirement or disclosure of documentary material which would be discoverable under ~~Rule 26~~ of the ^{Federal} Rules of Civil Procedure.

"(d) Service of any demand may be made by:

"(1) delivering a duly executed copy of the demand to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of that person;

"(2) delivering a duly executed copy of the demand to the principal place of business in the state of the person to be served;

"(3) mailing by registered mail or certified mail a duly executed copy of the demand addressed to the person to be served at the principal place of business in this state, or if the person has no place of business in this state, to his principal office or place of business.

"(c) Documentary material demanded pursuant to this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at other times and places as may be agreed on by the person served and the consumer protection division.

"(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the consumer protection division without the consent of the person who produced the material. The consumer protection division shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person. The consumer protection division may use the documentary material or copies of it as it determines necessary in the enforcement of this subchapter, including presentation before any court. Any material which contains trade secrets shall not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing the material.

"(g) At any time before the return date specified in the demand, or within 20 days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside the demand, stating good cause, may be filed in the district court in the county where the parties reside, or a district court of Travis County.

"(h) A person on whom a demand is served under this section shall comply with the terms of the demand unless otherwise provided by a court order.

"(i) Personal service of a similar investigative demand under this section may be made on any person outside of this state if the person has engaged in conduct in violation of this subchapter. Such persons shall be deemed to have submitted themselves to the jurisdiction of this state within the meaning of this section.

"Sec^{17.62} 17.62. PENALTIES. (a) Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with Section 17.60 or 17.61 of this subchapter, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material or merchandise or

sample of merchandise is guilty of a misdemeanor and on conviction is punishable by a fine of not more than \$5,000 or by confinement in the county jail for not more than one year, or both.

"(b) If a person fails to comply with a directive of the consumer protection division under Section 17.60 of this subchapter or with a civil investigative demand for documentary material served on him under Section 17.61 of this subchapter, or if satisfactory copying or reproduction of the material cannot be done and the person refuses to surrender the material, the consumer protection division may file in the district court in the county in which the person resides, is found, or transacts business, and serve on the person, a petition for an order of the court for enforcement of Sections 17.60 and 17.61 of this subchapter. If the person transacts business in more than one county, the petition shall be filed in the county in which the person maintains his principal place of business, or in another county agreed on by the parties to the petition.

"(c) When a petition is filed in the district court in any county under this section, the court shall have jurisdiction to hear and determine the matter presented and to enter any order required to carry into effect the provisions of Sections 17.60 and 17.61 of this subchapter. Any final order entered is subject to appeal to the Texas Supreme Court. Failure to comply with any final order entered under this section is punishable by contempt.

"~~Sec 17.63.~~ ^{17.63.} APPLICATION. The provisions of this subchapter apply only to acts or practices occurring after the effective date of this subchapter, except a right of action or power granted to the attorney general under Chapter 10, Title 79, Revised Civil Statutes of Texas, 1925, as amended, prior to the effective date of this subchapter."

✓ "~~Sec 2.~~ (a) Amend Section 13, Article 21.21, Texas Insurance Code, ^{as amended,} to read as follows:

"~~Sec 13.~~ ^{13.} Rules and Regulations. (a) The State Board of Insurance is authorized to promulgate and may promulgate and enforce reasonable rules and regulations and may order such provision as is necessary in the accomplishment of the purposes of this Article and Article 21.20, including, but not limited to,

"(f) The action of the Board in adopting, amending, repealing, or failing to adopt a regulation or denying a hearing may be invalidated only if it is found that it:

"(1) violates a constitutional or state statutory provision;

"(2) exceeds the statutory authority of the Board;

"(3) is arbitrary or capricious or characterized by abuse of discretion or unwarranted exercise of discretion;

"(4) is so vague that it does not establish sufficiently definite standards with which conduct can be conformed;

"(5) is made on unlawful procedure; or

"(6) is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record as submitted."

(b) Amend Section 7, Article 21.21, Insurance Code, (to read as follows:

"Section 7. Cease and Desist Orders. (a) If, after (such) hearing under the terms of Section 6 of the Act, the Board shall determine that the method of competition or the act or practice in question is defined in Section 4 of this Article, or rules or regulations issued under this Article, or in Section 17.46 of the Business and Commerce Code, and that the person complained of has engaged in such method of competition, act or practice in violation of this Article or rules and regulations issued under this Article or of the Deceptive Trade Practices - Consumer Remedies Act, as specified in Section 17.46 of the Business and Commerce Code, it shall reduce its findings to writing and issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such method of competition, ^{act} ~~and~~ or practice. []

[The] (b) Until a petition appealing from such order shall have been filed in a District Court of Travis County, Texas, in accordance with Subchapter F of Chapter 21 of the Insurance Code of this state, or any amendment thereof, the Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside in whole or in part any order issued under this section.

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"(c) Any person who violates the terms of a cease and desist order under this section shall be given notice to appear and show cause, at a hearing to be held in conformity with Section 6 of this Article, why he should not forfeit and pay to the state a civil penalty of not more than \$1,000 per violation and not to exceed a total of \$5,000. In determining whether or not a cease and desist order has been violated, the Board shall take into consideration the maintenance of procedures reasonably adapted to insure compliance with the order.

"(d) An order of the Board awarding civil penalties under Subsection (c) of this section applies only to violations of this order incurred prior to the awarding of the penalty order."

"(c) Amend Article 21.21, Insurance Code, by adding Sections 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 to read as follows:

"Section 14. Administrative Class Action. (a) In connection with the issuance of a cease and desist order as provided in Section 7 of this Article or upon application of any aggrieved person, the Board may, after notice and hearing as provided in Section 6 of this Article, in connection with the issuance of a cease and desist order resulting from a finding that an insurer has engaged in a method of competition, act or practice in violation of this Article, rules or regulations issued under this Article, or Section 17.46, Business and Commerce Code, or upon finding by the Board that the aggrieved person and persons similarly situated were induced to purchase a policy of insurance as a result of the insurer engaging in a method of competition, act or practice in violation of this Article, rules or regulations issued under this Article or Section 17.46, Business and Commerce Code, the Board may require the insurer to account for all premiums collected for policies issued during the immediately preceding two years in connection with such acts in violation of this Article and require: (i) such insurer to give notice to all persons from whom such premiums were collected, and (ii) to refund the total of all premiums collected from each such person, electing to accept a premium refund in exchange for cancellation of the policy of insurance issued. Premiums so refunded shall be net of policy benefits actually paid by such insurer while the policy of insurance was in force. The Board shall specify a reasonable time within which the insurer shall be required to make such premium refunds.

"(b) If an insurer fails to comply with the Board's requirement to refund such premiums within the time specified, the Board may, in addition to any other sanctions provided for in the Insurance Code and other applicable laws,

report such failure to the Attorney General and request the Attorney General to file a suit to enforce the Board's requirement for refund of premiums. Venue for such suit shall lie in the District Court of Travis County, Texas, and upon finding by the Court that such requirement of the Board was lawfully entered and that the insurer has failed to comply with such requirement, the Court shall enter an appropriate order to enforce such Board order. The Court may enforce its order through contempt proceedings.

"(c) Compliance or attempts to comply with the Board's requirement to refund premiums shall be an offer to compromise and shall be inadmissible as evidence. Compliance or attempts to comply with the Board's requirement for refund of premium shall not be considered as admission of engaging in an unlawful act or practice. Evidence of compliance or attempts to comply with the Board's requirements of refund or premium may be introduced by the defendant for the purpose of establishing good faith or to show compliance with the Board's requirement. ✓

"Sec^{Tion} 15. Injunctions. (a) If the Board has reason to believe that any person in the insurance business in this State is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this Article or rules or regulations issued under this Article or by Section 17.46 of the Business and Commerce Code, and that proceedings would be in the public interest, the Board may request the Attorney General to bring an action in the name of the state against the person to restrain by temporary or permanent injunction the use of such method, act, or practice.

"(b) An action brought under Subsection (a) of this section may be commenced in the district court of the county in which the person against whom it is brought resides, has his principal place of business, is doing business, or in the district court of the county where the transaction occurred or any substantial portion of the transaction occurred, or in a district court of Travis County. The court may issue appropriate temporary or permanent injunctions, and the injunctions shall be issued without bond;

“(c) In addition to the request for a temporary or permanent injunction in a proceeding brought under Subsection (a) of this section, the Attorney General, on a finding by the court that the defendant has engaged or is engaging in a practice declared to be unlawful by Article 17.46 of the Business and Commerce Code, this Article, or rules or regulations issued under this Article, may request a civil penalty of not more than \$2,000 per violation and not to exceed a total of \$10,000 to be paid to the state.

“(d) The court may make such additional orders or judgments as are necessary to compensate identifiable persons for actual damages or restoration of money or property, real or personal, which may have been acquired by means of any act or practice restrained. Damages may not include any damages incurred beyond a point two years prior to the institution of the action.

“(e) Any person who violates the terms of an injunction under this section shall forfeit and pay to the state a civil penalty of not more than \$10,000 per violation not to exceed \$50,000. In determining whether or not an injunction has been violated the court shall take into consideration the maintenance of procedures reasonably adapted to insure compliance with the injunction. For the purposes of this section, the district court issuing the injunction shall retain jurisdiction, and the cause shall be continued, and in such cases, the Attorney General with prior notice to the Board, acting in the name of the state, may petition for recovery of civil penalties under this section.

“(f) An order of the court awarding civil penalties under Subsection (e) of this section applies only to violations of the injunction incurred prior to the awarding of the penalty order. Second or subsequent violations of an injunction issued under this section are subject to the same penalties set out in Subsection (e) of this section.

“Sec¹⁶ 16. Relief Available to Injured Parties. (a) Any person who has been injured by another's engaging in any of the practices declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition and unfair and deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46

of the Business ~~and~~ Commerce Code, as an unlawful deceptive trade practice may maintain an action against the company or companies engaging in such acts or practices.

"(b) In a suit filed under this section, any plaintiff who prevails may obtain:

"(1) three times the amount of actual damages plus court costs and attorneys' fees reasonable in relation to the amount of work expended;

"(2) an order enjoining such acts or failure to act;

~~"(3) punitive damages;~~

"(3) any other relief which the Court deems proper.

"(c) On a finding by the Court that an action under this section was groundless and brought in bad faith or for the purpose of harassment, the Court may award to the defendant reasonable attorneys' fees in relation to the amount of work expended.

"(d) In an action under this section, damages may not include any damages incurred beyond a point two years prior to the institution of the action.

"Section 17. Class Actions. (a) If a member of the insurance buying public has been damaged by an unlawful method, act, or practice defined in Section 4 of this Article or by the rules and regulations lawfully adopted by the Board under this Article or by any practice defined by Section 17.46 of the Business ~~and~~ Commerce Code, as an unlawful deceptive trade practice, the Board may request the Attorney General to bring a class action, or the individual damaged may bring an action on behalf of himself and others similarly situated, to recover damages and relief as provided in this Section.

"(b) A plaintiff who prevails in a class action under this section may recover:

"(1) court costs and attorneys' fees reasonable in relation to the amount of work expended in addition to actual damages;

"(2) an order enjoining the act or failure to act;

~~"(3) punitive damages;~~

"(3) any other relief which the Court deems proper.

"(c) On a finding by the Court that an action under this section was brought by an individual plaintiff in bad faith or for the purpose of harassment, the Court may award to the defendant reasonable attorneys' fees in relation to the work expended, ^{and} court costs, ~~and punitive damages.~~

'(d) In an action under this section, damages may not include any damages incurred beyond a point two years prior to the institution of the action.

'(e) An action under this section may not be maintained or shall be stayed if proceedings regarding an administrative class action under Section 14 of this Article have been initiated regarding the same acts or practices and the same defendant in the action under this section. ✓

'Sec¹⁸ 18. Class Action: Procedure. (a) The court shall permit one or more members of a class to sue or be sued as representative parties on behalf of the class only if:

'(1) the class is so numerous that joinder of all members is impracticable;

'(2) there are questions of law or fact common to the class;

'(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

'(4) the representative parties will fairly and adequately protect the interests of the class.

'(b) An action may be maintained as a class action if the prerequisites of Subsection (a) of this section are satisfied and in addition: /

'(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

'(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

'(B) adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

'(2) the party opposing the class has acted or refused to act on ground generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

'(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

'(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

'(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

'(C) the desirability or undesirability of controversy concentrating the litigation of the claims in the particular forum; and

'(D) the difficulties likely to be encountered in the management of a class action.

'(c) In construing this section, the courts of Texas shall be guided by the decisions of the federal courts interpreting Rule 23, Federal Rules of Civil Procedure, as they apply.

'(d) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained as a class action. An order under this subsection may be altered or amended before a decision on the merits. An order determining that the action may or may not be brought as a class action is an interlocutory order which is appealable and the procedures provided in Rule 385, Texas Rules of Civil Procedure, apply.

'(e) If the action is permitted as a class action, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

'(f) The notice shall contain a statement that:

'(1) the court will exclude the member notified from the class if he so requests by a specified date;

'(2) the judgment, whether favorable or not, will include all members who do not request exclusion; and

'(3) any member who does not request exclusion, if he desires, may enter an appearance through counsel.

'(g) A class action may not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given to all members of the class in such manner as the court directs.

"(h) When appropriate, an action may be brought or maintained as a class action with respect to particular issues or a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall be construed and applied accordingly.

"(i) The judgment in a class action shall describe those to whom the notice was directed and who have not requested exclusion and those the court finds to be members of the class. The court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

"(j) In the conduct of a class action the court may make appropriate orders:

"(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

"(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members or to the Attorney General of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

"(3) imposing conditions on the representative parties or on intervenors;

"(4) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; or

"(5) dealing with similar procedural matters.

"(k) The filing of a suit under this section tolls the statute of limitations for bringing a suit by an individual under Section 16 of this Article. An order of the court denying the bringing of a suit as a class action does not affect the ability of an individual to bring the same or a similar suit under Section 16 of this Article.

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Sec. 19. Preliminary Notice. (a) At least 30 days prior to the commencement of a class action suit for damages under Section 17 of this Article, the prospective plaintiff must notify the intended defendant of his complaint and make demand that the defendant provide relief to the prospective plaintiff and others similarly situated. A copy of the notice must also be sent to the Commissioner of Insurance.

(b) The notice must be in writing and sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, the intended defendant's principal place of business in this state, or if neither will effect notice, to the office of the Secretary of State of Texas.

(c) An action for injunctive relief under Section 17 of this Article may be commenced without compliance with Subsection (a) of this section. Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with the provisions of Subsection (a) of this section, the plaintiff may amend his complaint without leave of court to include a request for damages.

(d) No damages may be awarded to a class under Section 17 of this Article if within 30 days of receipt of the notice the intended defendant furnished the plaintiff, by certified or registered mail, return receipt requested, a written offer of settlement. The offer of settlement must include a statement that:

(1) all others similarly situated have been adequately identified or a reasonable effort to identify such others has been made; and a description of the class so identified and the method employed to identify them;

(2) all persons so identified have been notified that upon request the intended defendant will provide relief to them and all others similarly situated, and a complete explanation of the relief being afforded and a copy of the notice or communication which the intended defendant is providing to the members of the class;

(3) the relief being afforded the consumer has been, or if said offer is accepted by the consumer, will be given within a stated reasonable time; and

(4) the practice complained of has ceased.

(c) Attempts to comply with the provisions of this section by a person receiving a demand shall be an offer to compromise and shall be inadmissible as evidence. Attempts to comply with a demand shall not be considered an admission of engaging in an unlawful act or practice. Evidence of compliance or attempts to comply with the provisions of this section may be introduced by a defendant for the purpose of establishing good faith or to show compliance with the provisions of this section.

^{tion} Sec. 20. Damages: Defense. No award of damages may be given in any class action filed under Section 17 of this Article if the defendant:

(1) proves that the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any error; and

(2) made restitution of any consideration received from any member of the class.

^{tion} Sec. 21. Venue. Any action brought under this Article shall be commenced in a district court of Travis County, Texas, if the State Board of Insurance is a party thereto.

^{tion} Sec. 22. Voluntary Compliance. (a) In the administration of this Article the Board may accept assurance of voluntary compliance with respect to any act or practice which violates this Article or regulations issued under this Article or any act declared to be unlawful in Section 17.46 of the Business and Commerce Code, from any person who is engaging in, has engaged in, or is about to engage in the act or practice. The assurance shall be in writing and shall be filed with the Board.

(b) The acceptance of an assurance of voluntary compliance may be conditioned on the stipulation that the person in violation of this Article or regulations issued under this Article, or Section 17.46, Business and Commerce Code, restore to any person in interest any money which may have been acquired by means of acts or practices which violate this Article or regulations issued under this Article, or Section 17.46, Business and Commerce Code.

"(c) An assurance of voluntary compliance shall not be considered an admission of prior violation of this Article or regulations issued under this Article or Section 17.46, Business and Commerce Code. However, unless an assurance has been rescinded by agreement, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this Article or regulations issued under this Article or Section 17.46, Business and Commerce Code.

"(d) Matters closed by the filing of an assurance of voluntary compliance may be reopened at any time. Assurance of voluntary compliance shall in no way affect individual rights of action under this Article, except that the right of individuals with regard to money received pursuant to a stipulation in the voluntary compliance under Subsection (b) of this section are governed by the terms of the voluntary compliance.

"Sec^{tion} 23. Those civil penalties, premium refunds, judgments, compensatory judgments, individual recoveries, orders, class action awards, costs, damages, or attorneys' fees which are assessed or awarded as provided in this Article shall be paid only from the capital or surplus funds of the offending insurance company, and no such payments shall take precedence over, be in priority to, or in any manner be applicable to the provisions of Article 21.28-B, Insurance Code, known as the Loss Claimants Priorities Act, Article 21.28-C, Insurance Code, known as the property and Casualty Insurance Guaranty Act, Article 21.28-E, Insurance Code, known as the Life, Health and Accident Guaranty Act, any other similar insurance guaranty act hereafter enacted by the Texas Legislature, or Article 21.39-A, Insurance Code, known as the Asset Protection Act, and such special statutes and the priorities of funds created thereby shall be exempt from the provisions of this Article.

"Sec^{tion} 24. No remedy or civil penalty shall lie or exist by reason of any act or omission occurring prior to the effective date of this Act.

"Sec. 3. Chapter 10, Title 79, Revised Civil Statutes of Texas, 1925, as amended (Article 5069-10.01, et seq., Vernon's Texas Civil Statutes), is repealed.

Sec. 4. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 5. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Handing 1874

CHAIRMAN : The committee will come to order and the Clerk will call the roll.

CLERK : Senator Andujar - present, Senator
Gammage - _____, Senator Clower - present.

CHAIRMAN : A quorum being present, then we can proceed with our agenda here. The first thing is the adoption of the rules. _____, you've seen the rules in the front here. These are the rules that were adopted by the Human Resources Committee and I would suggest that we do is just adopt them. Do you so move? Then there is no objection to adopting the rules. The first order and the only thing on the calendar is S.B. 75. The Chair lays out S.B. 75 by Mauzy and recognizes Senator Mauzy.

MAUZY : Mr. Chairman and members of the Committee, Senate Bill 75 is a bill that has been worked on jointly by a number of individuals and groups to provide a meaningful deceptive trade practices and consumer remedies act for Texas. Now this bill is--is really an attempt to restore free enterprise and competition to the marketplace in Texas. It is not anti-anything or anybody, but rather it is pro-free enterprise competitive concept in the marketplace.

Mr. Chairman, since the bill has been introduced, we have made several technical corrections to the bill which we will send up in the form of a committee substitute at the appropriate time, but in order to fully explain the bill to you, I would like to call as the first witness, the Attorney General of Texas, The Honorable John Hill, who has been most helpful in helping draft this bill and who can explain all the details of the bill to the committee. With your permission, Mr. Chairman, I would like to call the Attorney General of Texas.

GENERAL HILL : Thank you, Senator Mauzy and Senator Andujar and Mr. Chairman, Senator Clower, may I be seated, please? I understand you are taping and it might pick up better.

Of course, I know the first question that you ask yourself at a moment like this is why is this bill

necessary? Under our present Consumer Law, the Attorney General can file suit, of course, for certain specified deceptive trade practices which are set out in the act and commonly referred to as the "laundry list" in the past. The "dirty laundry list" I guess you could call it, the things that honest businessmen don't do, and that no one should do to a consumer. It constitutes fraud, simply put in the sense of deception or misleading a consumer that what he is receiving is one thing when in fact it is another.

Now, a private citizen today can go into a court on his own if he has suffered some loss by virtue of a deception, but he must prove in order to show a cause of action, common law fraud. Those of us who have tried cases understand and know perhaps by our own failures how difficult that is on a private citizen to make that kind of proof. As Attorney General we can go in under the present law and we must only prove a violation of a particular statute which we sue under. But a private citizen must show that the representation was made, that the citizen--that it was false, that it was done intended to deceive him and that he suffered injury, but the worst problem that the consumer has for any real relief from the damage that was done is that he goes to a lawyer and I have seen this so much and one of the reasons that I am strongly back of this bill, comes from my own experience as a public lawyer in this state for twenty-three years of seeing people come to your office who have suffered harm and sometimes the cost is more for an hour's consultation with a lawyer than maybe the entire amount of the recovery that he would expect to get from going to court and the difficulties, the practical difficulties of getting any real relief.

Of course, the next point that I would like to stress on why this bill is necessary is that the Attorney General cannot by statute seek to obtain restitution for consumers who are victimized by deceptive practice. We can have the practice stopped under the present law with no penalty to the wrongdoer,

so long as he just ceases the practice. If he says, all right, I'll sin no more. That's it. Now if he persists in the practice once a temporary injunction is granted under our present law, of course, we can then seek civil penalties for the contempt of the court's order. But the consumer is not helped even then. And it is obvious that the consumer really has no remedy for monetary injury due to deceptive trade practice other than this very onerous common law action of fraud.

Now we receive from 30 to 40 complaints from consumers each day in the Attorney General's Office and the same holds true for the fourteen better business bureaus located in our state, as well as local consumer protection agencies that are being created I am glad to see within so many of our cities. And this is not even to mention the many state agencies that are involved to some degree in other consumer protection work. You are aware of the Agricultural Department for example, the implication and involvement in this work. And none of these agencies can recover one thin dime on behalf of any consumer that is victimized by the practices which these agencies are created to investigate. So the Texas Consumer Remedies Act before you would allow a consumer who can prove a violation of the act, and that is very important to underscore, who can prove a violation of the act. So he has a burden under this act and a heavy burden, to go to his private lawyer in order to get his money back. The damages recoverable would be three times his actual damages plus court costs, plus reasonable attorney's fees to be allowed by the court in proportion to the work done by the lawyer, that is in terms of actual work done, not on any basis to turn the court loose at his will on this. And of course the consumer could ask the court upon a finding of the violation to stop the practice.

Now, I want to stress that you must prove a violation of the act, and that brings me to this. Most businessmen who have voiced their opinion to me agree that it will be very beneficial to have one agency on the state level

administering one law which can tell them what acts and practices are questionable so that they can avoid any possible problems, and that's what this bill does in bringing this into the Attorney General's Office and bringing not only the citizen's suit based upon the same set of circumstances, but our remedies on the same set of circumstances. So you get this consistency of policy and the guidelines are clear and everyone concerned knows what the rules of the game are.

So the thing that I want to compliment Jack Welch and the people with the Texas Federation Retailers-- I told Joe Longley and Liz Levantino frankly when we started-- when they started work on this bill many months ago with Senator Gammage and Senator Mauzy and so many of you that have involved yourself in consumerism that I would--that I was very interested in this subject and that I would help, but I thought that it very important that the bill be drawn with consultation, with everybody that was concerned with it, so that we go in with a fair bill, that it not be an anti-business bill, that it be truly an anti-fraud bill, an anti-deception bill, and that you put yourself as you draw it in the shoes of the businessman as well as the consumer and to try to work to a product that we could all stand and say, this is a good bill. This is a fair bill, and it has been worked at that way, and I tell you in all candor, and I have seen not as many bills as you gentlemen who have been in this process day to day, but a lot of bills, this is one of the finest pieces of legislation that I have ever seen. As it stands right now, I can't imagine anyone voting against it, and I really feel that it is one of the best drawn pieces of legislation, that it has been gone into in great detail with the people that are involved, and I don't think that anyone would have anything to fear. It is not anti-business. It is anti-fraud. It's anti-deception, and no reputable, respectable, honest businessman has anything to fear by the passage of this law. The entire thrust of the

act is directed as Senator Mauzy said, to those who would not perform in an honest manner in the marketplace. We all realize that 95 percent or more of our business is honest, and this bill is directed at the small percent which give the other 95 upward percent the black eye. And the ultimate effect of the bill is to strengthen business because misleading and deceptive practices will hopefully be driven from the marketplace through the public and private enforcement of this act. And there is only one way to stop the unscrupulous dealer, and that is to deprive him of the incentive to deceive. And this bill would make it unprofitable for someone to engage in clearly spelled out, well-known deceptive trade practices. And by employing the principle upon which our free enterprise is founded to which Senator Mauzy referred, shady business practices can be brought to an absolute minimum while at the same time honest businessmen can continue to conduct their business in the fair, open and competitive manner which we are proud to say the overwhelming percentage of our businessmen do. Now what other--and you will see many safeguards. One reason that the bill is so long frankly has been this effort to build in some of the safeguards that are necessary in a bill of this type to see that the honest businessman is not harrassed, that the suits are not frivolous, and if they are, if they are brought in bad faith that he gets the protection that the law entitles--to which he is entitled because he has been wronged. It is no more right for an individual to bring a suit in bad faith and against a businessman to harrass him than it is for someone selling to be guilty of deceptive trade practices and both of those wrongs are dealt with in this bill, and--

ANDUJAR : Where is that?

GENERAL HILL : It's--Senator, it's provided--I am sorry to say I don't know these sections well enough to just flip right to the part which is the harrassment section. Can you help me, Liz?

LEVANTINO : 1752--

GENERAL HILL : 1752--

LEVANTINO : --on page 13 of the committee substitute.

GENERAL HILL : Page 13--

LEVANTINO : Pardon me, on page 14, Subsection C at the very top of the page. And then--

GENERAL HILL : Yes. The first one there, before you find the other one--do you have that, Senator?

LEVANTINO : And then on page 15 with regard to class actions.

GENERAL HILL : "On a finding by the court that an action under this section was groundless and brought in bad faith for the purpose of harrassment, the court may award to the defendant reasonable attorney's fees in relation to the amount of work expended." And then on the following page, it's Section C again which is the second paragraph--"On a finding by the court that an action under this section was brought in bad faith or for purposes of harrassment, the court may award to the defendant reasonable attorney's fees in relation to the work expended in ____." The regulations that the Attorney General can issue under this bill must be signed by at least 100 interested persons--again, one of the reasons that the bill is long is to try to make this procedure open, make it have real substance to it, real meaning, where those who disagree with the regulation, if they do, have a right to appeal, where all of the process is open, the regulations are clear, the procedures we use, the modus operandi. So, again, we tried to build in to that provision every conceivable safeguard, and before regulation was passed and before it became an additional practice--it gives the bill some flexibility, but we cannot have our bill at anytime in conflict with the federal trade regulations which also I think is a very good part of this bill and which will give us the consistency in this field that I think everyone concerned needs in Texas.

The class action lawsuit has to be brought under very strict circumstances. And, again, if you will read the class action section of it, this is a bill that

does take time to read, of course,--takes time to look at the various sections, and I realize that when you look at the class action part of it, it seems to go on and on. But the reason for that was again our efforts to say to those in the business communities who may have again the concern--this would be a new concept, this would be a new remedy to say to them that the class action will be brought under circumstances where it ought to be brought, and it could not be brought under circumstances again where it was--the suits were for harrassment or for frivolous claims because they must be based upon a finding that--must be based first on an absolute violation of this act as spelled out in what constitutes a deceptive trade practice or upon a finding by an appellate court that a deceptive trade practice actually exists. So this within itself means that each class action must be brought on some tangible positive deception that has already had the dignity of law behind it. And then he must --well, if anyone has ever bothered with class actions, they know how complicated they are and I believe that every safeguard has been put in this bill that anyone could possibly think of and I won't take your time now going to the details of them. I would like for Joe Longley and Liz Levantino--I would if I could with the committee's permission after whatever questioning you care of me to be excused because of some commitments I have in my office, but they can, and will, answer any of the details that you might have in regard to this class action. There is a provision in here in addition that is a safeguard that no damages may be awarded in a court action if within 30 days of receipt of the notice the defendant notifies the consumer that he will provide relief to the consumer and others similarly situated. There is a provision for voluntary compliance where they can be purged with a voluntary arrangement. If it is an advertisement that he puts in a--that is not his--that he had nothing really to do with, he is protected under the bill. If he took it in good faith and he published it, if he has no financial interest in the product or service that is being advertised deceptively,

he is not responsible, and there is a--just extensive procedures throughout this bill to provide for good faith errors. When I spoke to the Retail Grocers about this bill, this--what's today, I lose track of time, I believe it was this week--if it wasn't it was the latter part of last week that--because I think we are all twenty-one, we are down here to try to pass legislation that is in the public interest. There is no need going to one group and talking one way and another. I wanted them to be familiar with this bill. I am supporting it. I am proud to be supporting it because I think it is good legislation for this state and is badly needed. To simply say to them what the bill was about so they would be advised, and if they had any criticism of it to come here. I am happy to say that Jack Welch and others who have seen fit to support this bill, but the question came up. He said, "What if I advertise that I am going to sell these--all these roasts at a given time"--I believe it was roasts he illustrated with--"and then the train doesn't come in? It's not my fault that I didn't switch and bait on anybody. I just didn't get them." I said, "Well, you are protected because we have got a section in here that talks about good faith errors where you just didn't work out like you thought it would, but it wasn't your fault. You weren't out to deceive." And the only people that are involved in this bill are the folks that are out to deceive the people of this state. And I am under the impression that's whom we have been sent up here to protect. Thank you.

CHAIRMAN : Thank you, General Hill. Let the record reflect that Senator Gammage has been in here since the outset of the testimony. Are there any questions? Thank you, John.

GENERAL HILL : Thank you.

MAUZY : Mr. Chairman, I would like to next call Mr. Jack Welch of the Retail Federation.

CHAIRMAN : So called.

WELCH : Mr. Chairman, Senator Andujar, Senator Gammage, my name is Jack Welch. I am a lawyer from Marlin and represent the Texas Retail Federation. The Texas Retail Federation is a trade association consisting of department, dry good, jewelry, and specialty stores throughout Texas. Our membership recognizes that its responsibility is to the consumer and we also know that if there is a disreputable retailer that this will reflect discredit upon all of our members. We also recognize the point that often times now the consumer does not have an adequate remedy. We feel that this bill is fair. We feel that it will give the consumer a remedy in this area and this is the reason that our association is supporting it. We have worked with General Hill's staff for sometime in suggestions in reference to certain provisions of the bill, suggestions primarily to obtain as the word has been used so much in the meetings "specificity." In other words, so the retailer would know what is against the law and what is not, and we hope that we have obtained that in this bill. Of course, my endorsement, the Texas Retail Federation's endorsement of the bill, is an endorsement solely, of course, as it applies to retailing. I would not come before you not representing some other segment and impose this upon them, but insofar as it affects retailing, our group does endorse the measure.

I will say that General Hill and his assistants in our discussions with him and our meetings with him have been most fair. They have tried in my opinion to not only see that the consumer receives protection, but to also see that the retailer was not penalized or that no punitive measures were put in against the legitimate retailer. So as far as we are concerned, we do endorse the bill insofar as it affects retail.

CHAIRMAN : Any questions?

MAUZY : Mr. Chairman, I would like to now call Mr. Joe Longley of the Attorney General's Office who can speak to the detail of the bill being the chief draftsman of

this bill.

CHAIRMAN : Let me ask Jack one--Jack?

WELCH : Yes.

CHAIRMAN : What is the size of your organization?

WELCH : Senator, it covers about 90 percent of the department, dry goods, and specialty stores. I am not familiar--several thousand stores. It is the only association that represents these people and the small--we have many, many small members, large of the chains, the independents. It is the only association in Texas that represents the department stores, the dry goods stores, the specialty stores, and the _____ (inaudible due to overlapping conversations).

CHAIRMAN : Do you have any idea about what percentage of those types of business in existence that you speak for?

WELCH : I would say 90 percent.

CHAIRMAN : Ninety percent.

WELCH : Yes, sir.

CHAIRMAN : Thank you.

WELCH : Mickey Moore, our executive vice president, verifies that.

LONGLEY : Mr. Chairman, Senator Andujar, Senator Gammage, it is my pleasure to be here. My name is Joe Longley. I am currently the chief of the Anti-Trust and Consumer Protection Division at the State Attorney General's Office. With the Committee's indulgence I will more or less go through the mechanics of the bill itself to sort of show where the changes are from the existing law and to give a brief overview if I may of what the bill does. And I will try not to repeat some of the specific points that General Hill has talked about, and I'll just more or less go through these things one at a time in listening fashion.

As has already been pointed out, Senate

Bill 75, the Committee Substitute is what I am looking from, is a comprehensive consumer protection bill which deals not only with deceptive trade practices, but also with new consumer remedies. It is a new concept as General Hill has stated and the first basic thing that the bill would do would be to change the existing structure of the deceptive trade practices act. Currently, that act is situated in Chapter 10 of the Consumer Credit Code, and this particular bill would take Chapter 10 out of the Consumer Credit Code and place it in the Business and Commerce Code as a new chapter there. The net effect of this would be to--if I could just back track for just a moment to give you a little history on the Consumer Credit Code. Currently the Attorney General's Office and the Consumer Credit Commission both have concurrent jurisdiction as far as the Chapter 10 situation is concerned. So this would be to take the jurisdiction away from the Consumer Credit Commission as to Chapter 10 only and place it entirely under the Attorney General's Office. This is the first major change that you will encounter as you read through the bill and see what it does.

Secondly, the bill adds new definitions of a deceptive trade practice. Currently in the current law I believe there are some seventeen or eighteen defined deceptive trade practices. Under the Committee Substitute that I am looking from which I understand has not yet been formerly before the subcommittee, but with a few minor changes, it is Senate Bill 75, there are currently twenty-one specified deceptive trade practices which would be a change from the old law. With reference to those I might add that the Federal Trade Commission has rules and regulations which also are incorporated into the bill. This is the same as it was in the old law, both the Federal Trade Commission and at the request of Commissioner Kelly at the Consumer Credit Commission, the Federal Reserve Board regulations have been included in this bill so that there will be no conflict by any possible rules or regulations which could be issued out of

the Attorney General's Office.

CHAIRMAN : Joe, which are the new deceptive trade practices that have been added?

LONGLEY : On page 4 would be where we would start numbers--oh, excuse me--it would be numbers 16 which regards running back of odometers on automobiles, the mileage part of the speedometer. It would be 18 which refers to chain referral plans, number 19 which would prohibit the representation of the guarantee or warranty confers rights or remedies which it does not confer, twenty which would regard the rules and regulations which could be issued by the Attorney General's Office through the Consumer Protection Division. I am sorry that's been changed. Number twenty in the Substitute is "Selling goods or services to a consumer and the subsequent failure of the seller or the solicitor to honor his express or implied warranties." Number 21 would be with regard to the regulations which could be issued by the Attorney General's Office.

Now if I may for a moment just discuss the rules and regulations for it. This too is a--

CHAIRMAN : Just one moment now. Under the defined deceptive trade practices of--in the regular Committee S.B. 75, there is number two and three--"Causing confusion or misunderstanding as to the source, et cetera." Is there a body of law interpreting this, what this "causing confusion" means?

LONGLEY : "Causing confusion or misunderstanding" is -- the current body of the law is embodied in some of the Federal Trade Commission rules and regulations, as well as other court decisions.

CHAIRMAN : This is already the law in the--

LONGLEY : This is the present law.

CHAIRMAN : This is not something new then.

LONGLEY : Right. Right. All of these things except the ones that I just mentioned are the present law. I could have possibly missed one or two there, but there will be

a bill analysis coming out which will explain which ones are the new ones and which ones aren't.

With regard to the rules and regulations which are provided for in this act, it allows the Attorney General upon a petition by one-hundred interested parties to hold a hearing to determine if there is some practice which is being carried on in the state which could possibly be deceptive which is not necessarily specifically covered by these enumerated deceptive practices to let him hold a hearing to determine if some regulation should be issued much as the Federal Trade Commission or the Federal Reserve Board would issue rules and regulations. And as General Hill pointed out, this procedure for obtaining the rules and regulations is very extensive and the first thing that must be done is the petition by one-hundred interested people from either business or consumer groups to have such a regulation.

Now then, the procedure once that-- once the regulation process has been started is that the Consumer Protection Division of the Attorney General's Office could hold a hearing or it could deny a hearing based upon its preliminary findings. Now if it denies a hearing to the people who are requesting one on the proposed practice, then that ruling can be appealed on into the courts. In the event that a hearing is held and that a rule or regulation is adopted, repealed, or whatever action is taken from the hearing, any aggrieved party can appeal from that rule. And as the General stated, anyone can appear at these hearings on behalf of any interest that he might have and whatever action might be taken by the Attorney General's Office. It is going to be a complete, open procedure for everyone involved. There is no closed meetings, nor were any ever contemplated of any type like this. We are trying to work in an atmosphere of doing what is best for both business and consumer interests.

With regard to the restraining orders and the remedies available to the Attorney General's Office through its Consumer Protection Division, as I have stated, this act would take the jurisdiction away from the Consumer Credit Commission as far as Chapter 10 is concerned only, and it would place it with the Attorney General's Office. The theory behind this and the intention of the act is to create one state agency administering one law which deals with deceptive trade practices wherein businessmen and consumers alike know that this is going to be the place to go.

CHAIRMAN : Does the Consumer Protection Division presently have any enforcement capability?

LONGLEY : Yes, it does. Through the present law, and I will be getting to that in just one moment, we have the authority to seek restraining orders whenever we determine a deceptive trade practice is being carried on within the state. Now, the restraining order is merely to say, you know, "Sin no more. You must stop."

CHAIRMAN : What you do about it-- _____ (?)
Consumer Protection Agency then?

LONGLEY : Oh, you mean the Consumer Credit Commission?

CHAIRMAN : Excuse me, the Consumer Credit Commission.

LONGLEY : They do have the authority to investigate consumer complaints. When it comes time if they in their investigation determine that a suit should be filed, then they have to bring the case to our office and let us file the suit.

CHAIRMAN : So even now under the present law, the Attorney General in fact has all the enforcement?

LONGLEY : That is correct as far as the courtroom work is concerned. Now we do have concurrent jurisdiction as far as investigation is concerned. With regard to the restraining orders, and as I was mentioning, the Consumer Credit Commission has to come to us in order for us to take the case on into court. Now there have been some changes made from the

present law there. Currently the Attorney General once he goes to court to seek a practice to be stopped which is deceptive or false or misleading, well, that's all he can do at that time. He just has to say, Your Honor, this practice is bad. Give the reasons. Prove up the case. And if he proves that there has been a violation of the act, the court can issue an injunction, but that's all it can do at that point in time. No one gets any money back. No penalties are collected. About the only thing that really comes about in the way of penalization for the wrongdoer is adverse publicity which is good. It is a deterrent effect, but again no one is--no claims are satisfied and no real effective monetary damage has been suffered. So what this law would do would be to allow the Attorney General when in his determination a suit should be filed to seek civil penalties at the very institution of the lawsuit. In other words he wouldn't have to wait for a violation of the injunction. He could go in at the time that the practice is complained of and seek penalties of up to \$2,000 per violation proved. And there would be a maximum amount that he could collect on that of \$10,000 per lawsuit as to those penalties.

CHAIRMAN : What are these penalties based on?

LONGLEY : These would be upon the individual violations of the act. Let's take for an example the sending through the mails of a deceptive advertisement, just some advertisement which is not true in an effort to get someone into a store or into some business or something of this nature. We could allege that each letter sent was a violation. That has been the rules adopted by the Federal Trade Commission. Okay, under that theory we could seek \$2,000 for each violation but it could not exceed \$10,000. So what you were limited to is to prove our best five violations if there is more than one, and that's all we can collect the penalties on. Or, the court in its discretion can award no penalties obviously, and if we don't prove the case, then there is no detriment suffered to

the business and hopefully there is enough safeguards in the entire act to where none of these lawsuit type actions or regulations will be used for harrassment purposes. I believe the General went over that in fairly strong detail.

Another change which is made from the courtroom procedure is that an action brought by the Attorney General's Office can also seek if there is a violation of the injunction--let's assume that there has been penalties collected when he first goes into court, the court issues an injunction, demands that the practice be stopped, but then the practice continues even after the court says that it should be stopped. Then the Attorney General can seek \$10,000 for each violation after the injunction and that is not to exceed \$50,000 for each time he goes to court. In other words, if the practice continued after the injunction had been issued, he could go in and ask for \$10,000 for each violation he could prove. But this is not to exceed \$50,000. So again you are limited to more or less to five violations upon the seeking of the civil penalties for violation of the injunction. Again, if the practice continued after penalties had been collected the first time, he could go back and seek additional penalties at the next hearing. So the penalties are fairly strong, and the incentive is there for a deceptive trade practice to stop once this thing happens. And I might add right here to give an example of the present law, the way this thing works right now is that a company can engage in a very deceptive trade practice and I'll give the example of the Pyramid Sales Corporation which has now been declared to be deceptive per se by the Court of Civil Appeals here in Austin. A company can engage in these practices and take millions of dollars out of the State of Texas, but all we are authorized to do at the present time is to say, "Stop." That's it! We can just say, "You must quit. You have taken all the money you can." And I have had some of these people to

my face tell me, you know, I am going to keep doing this until some court tells me to stop. And so we are in the position of --they realize that they can take all the money they can get until someone tells them to quit, and once they are told to quit, they run the risk of having another suit brought to collect penalties. It is a very sad situation as far as the present law is concerned. So this would allow some more stringent penalties as far as the civil penalties are concerned.

Now the Attorney General would also have the authority to seek injunctions as I have stated. He could seek restitution on behalf of any identifiable person who had been victimized by the practice that has been complained of. He can also seek equitable orders from the court to do whatever the court feels necessary in the best interest of all the people, and he can even have a receiver appointed if within six months after the judgment's rendered by the court he can have a receivership appointed in order to satisfy the judgment. And this is a new departure from the present law also.

Section 1749 on page 11 of the bill is a new concept which is being explored to get local enforcement of the Consumer Protection laws and that would be the duty of district, county and city attorneys with regard to this act. As you can see, it says, "It is the duty of district, county and city attorneys to lend to the Consumer Protection Division any assistance requested in the commencement and prosecution of actions under this sub-chapter. And it allows these attorneys to institute and prosecute claims under this act themselves. If they wish, they can request the help of the Consumer Protection Division and there is really--it is an effort to get local enforcement and not just have to put everything through the Attorney General's Office in his office here in Austin and also through the regional offices which are currently being set up

in Ft. Worth, Dallas, San Antonio, Lubbock, El Paso and Houston, so, this is an added innovation, which hopefully, can get some local enforcement of the Public Law Sections of this Act.

The exemption part of the law has to do with advertising basically. It has deleted the insurance industry exemption, which is in the current law.

The current law currently places the insurance industry outside the purview of Deceptive Trade Practice Act, and anything that currently relates to insurance, or the advertising of insurance, cannot be investigated under the purview of the present law by the Attorney General's office...that ostensibly is done by the Insurance Commission, and I might add that at the present time we have not had any cases referred to the Attorney General's office for prosecution that by Agency, so I think that perhaps this -- this exemption can be justified to --

CHAIRMAN : Do you know whether or not they --

LONGLEY : To --

CHAIRMAN : -- have received many complaints about --

LONGLEY : I do know that the complaints that we get on insurance companies are referred to the Insurance Comm. simply because of the exemption, which is in the present law.

: How many complaints do you get?

LONGLEY : I haven't tabulated them since I've only been there for a little over a month now, in the new administration, however, I would say we've had in the vicinity of 8 to 10 complaints on insurance policies during that time. It could be more, or it could be a few less, but I have seen quite a few come across my desk.

Some of these may not be valid. It could be that, you know, there's just nothing there, or they haven't been investigated yet, something like this. Yes mam?

SEN. ANDUJAR : Did you say that this new bill does include insurance, or continues the exclusion?

LONGLEY : No, it does include insurance.

SEN. ANDUJAR : It does --

LONGLEY : It does away with the insurance exemption.

SEN. ANDUJAR : I thought that's what you said, but I wanted to be sure.

CHAIRMAN : Under the Provision here of 1750, it says that they're exempted, advertising media, the various ones are unless it is established that the owner or the employee with the advertising medium have knowledge of a false, deceptive or misleading act, _____. What does that mean? If someone is running an ad in newspaper, and somebody calls up and says that's false? Does that -- that give them knowledge, are they supposed to strike it down, or what?

LONGLEY : It could possibly mean that. It would -- this -- this tracks some of the present law right here now. What -- what it means is that if the -- the way I interpret it at the present time -- is that the person who disseminates the ad through the newspaper, in other words, the person who writes up the ad, or something like this, if he knows it's deceptive, or if he knows that it's not true whenever he takes the ad, well, this exemption does not apply. In other words, this is just an effort, that language is an effort to insure that people check out some of these things, and look at them, before they just cart blanche start putting in any advertisement that -- that comes into the classified counter or the commercial counter, start putting that into the newspaper or onto their TV station or radio station.

CHAIRMAN : This doesn't put a duty upon the advertising -- to check out advertising?

LONGLEY : Well, now, not -- not in the sense of extensive field investigation. It does, whenever it's brought to their attention, and we do bring it to the attention of -- of advertisers almost daily when we think something's deceptive, that ah -- you know, they -- they better check that ad a little more closely....see what's -- see what's going on with that business. Understand it, we don't want to put an onerous burden on advertisers,

and that's the reason for this exemption. However, on the other hand, I think the public has an interest in being protected of -- somewhat from a business standpoint.

CHAIRMAN : Does this apply to political advertising here to -- (laughter) -- I would have made some complaints in the last campaign.

LONGLEY : I've come to the persuasion that nothing applies to political advertising.

CHAIRMAN : Good. (inaudible)

LONGLEY : Subsection B of this exemption chapter, by the way, provides that nothing in this subchapter shall apply to acts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission, and this is in an effort to keep everything continuous and not in conflict. In other words, we -- we want to use the Federal Trade Commission and have the benefit of -- of all of their years of research and spade work in the area of deceptive trade practices, and it just allows us and the business man, and the consumer to know that whatever is in the Federal Trade Commission is the law, and that we're not going to depart from that.

The conflict of law section is a determination that -- that the rules and regulation issued by the Consumer Protection Division shall prevail over any conflicting rule or regulation of the state to the extent of conflict only. So, this is an effort to provide continuity once again with the other agencies that if there is a conflicting rule or regulation, the -- the rule will prevail from the Attorney Generals office as it deals with Deceptive Trade Practices.

Now, this is not to say that there could be other rules or regulations from other departments, because obviously there are. And there is a safeguard with regard to the Consumer Credit Comm. for rules and regulations issued by the Federal Reserve Board, and I believe in the Committee Substitute that's one of the corrective amendments that has been made there so that there will be no conflict in that -- in that procedure.

Now, 1752 starts the new ground that's being plowed that Attorney General Hill talked about. The relief for consumers is the new concept in the law that allows a private citizen to sue under the same Act that the Attorney General can sue under. And as -- and I think he aptly pointed out, this is not the case under the present law.

Right now private citizens have to sue under what's called the Common Law Action of Fraud, and they have at least 4 elements to prove there, which are much more difficult than just proving a violation of an Act. Those elements are that some representation was made, that that representation was false, that it was intended to be false, and that the consumer suffered some monetary injury as a result of that misrepresentation. So, under the present, -- under this Act, it would allow a private citizen who had victimized by a deceptive trade practice to go into court with his own private attorney, not have to rely upon some public agency or a bureaucracy created by the government. He could go in through private enforcement, enforce his rights as a consumer.

Now again, the safeguards that have been set up here is that he must prove a violation of the Act, and it must be one of these specific things that have been pointed out. I think -- I know in our dealings with the Texas Retail Federation, the other business men who I've talked with state that this is good because the Act specifically points out what can be objectionable, and it gives them something they rely upon...in the way as to information as to deceptive trade practices.

So, the relief for consumers is the major departure from the present law in that it allows private citizens to go into court to enforce their rights as individual citizens under the law, which can also be enforced by the Attorney General's office.

(END OF SIDE A) -- (BEGIN SIDE B)

: -- in an effort to hold down a number of lawsuits, and unclog the court dockets and keep a better handle on the litigation they can ban together into what's called a "class action" under very specific circumstances. And this is

much more strict than the regular cause of action a citizen can bring. He must show certain specific things in order to get into court as a class action, and even then the business man is protected because 30 days before an action may be filed, the business man must have notice that an action may be filed, and give -- gives him the opportunity to make restitution or make relief if he feels such a claim is valid. And in this case, the lawsuit can be avoided from a standpoint of the business man, and this is one of the very important protections that we have in here for the -- for the businesses which might fall under the Act.

As General Hill stated, the procedure is very --- is very strict, it tracks Federal Rule 23, ah, and under the -- under the present law we do not have any consumer class action law suits, especially after the ruling of the Texas Supreme Court last July, the case of Commercial Travelers Insurance Company v Franklin Spears. So, this would again be a major departure from the present law and would allow cause of action to be aggregated into more than just a one-person situation where all the people could be identified, and they could press their claims much more easily in the class action.

The Civil Investigative demand -- first, let me say the (voluntary clients procedure?) allows the Consumer Protection Div., where it wants to _____ the voluntary compliance to allows a business man to voluntarily sign a paper which can be filed with the court in Travis County, or where the violater resides or does business that would say more or less that he's not admitting that he's engaged in these practices, but they have been questioned and that he gives the Attorney Generals office the assurance that he will not engage in those practices.

As far as the Civil Investigative Demand is concerned on page 26 and on to the end of the Act there, this more or less tracks the present law and gives the Attorney General the same authority as the Consumer Credit Commissioner presently has under the present law, to make investigations on behalf of the Consumer Protection Division.

That basically, in a nutshell, is -- is the Bill. It is a lengthy Act, there's a lot of meat on the bone, as they say, and I

know there is at least one bill analysis, there has not been one for the Committee Substitute, but there -- the changes have been delineated and it's basically Senate Bill 75 which is before the Subcommittee.

Be happy to try to answer any questions.

CHAIRMAN : Sen. -- Thank you, Mr. Longley.

LONGLEY : I think at this time, Mr. Lloyd Doggett, with the Texas Consumer Association, may want to say his few words. Thank you.

DOGGETT : Senators, my name is Lloyd Doggett, and I'm a representative of the Texas Consumer Association. I want to say first that it is a pleasure to have this Committee to come to. I think it's an advance for the people of Texas to have a Senate Subcommittee on Consumer Affairs to consider bills like this.

This particular bill is one that has been discussed, its origins really go back to the last session of the Legislature, and there's been a good bit of work done on it during the last year, meetings with various interested groups to try to design a bill that would be as near to a perfect balance of all the conflicting interests involved as possible. And, as such, from the consumers standpoint, it's not a perfect bill, but I think it is a good bill and that it represents an equitable balance of interest between those who would be affected by it, and those who are affected by the non-regulation of our existing laws.

As a compromise, I think that it has some weak points as well as some strong points, and certainly some potential weak points as it begins to be analyzed by various affected groups. And I'd like to speak -- since you've heard about the way it would operate as it's currently drafted, and you've heard about some of the strengths of the proposal. To talk just a minute about some of the potential weaknesses, the first one lies in the area of exemptions from the bill.

It seems to me like if we're going to talk about dealing fairly with business, we have to talk about

dealing with it equally. It would not be an equitable proposal to hold the retailers to one standard and the insurance industry to another. To permit fraud in the loan company area, and to prohibit it in the area of auto sales. So, this bill tries to go across the board, and deal fairly and equally with all types of businesses within the state.

I think that if the member businesses the many member businesses of the Retail Federation, which is the largest effective group, can live with this bill as they've indicated that they can, that it's a bill that any responsible and honest business man can live with.

There's one exemption, in a way, that is provided in the Committee Substitute Bill, and I think probably properly so. It removes all of the references to the Consumer Credit Code. Under one of the earlier drafts there was a provision in there providing that Chapters 2, 3, 4, 5, 6 and 7 of the Consumer Credit Code, dealing with Consumer Credit violations, would be covered by this Act. This has been taken out and it's felt that the best way to reach the lack of effective remedies in the current Consumer Credit Code is to amend that Code directly. And so it will not be dealt with in this area.

But, the bill continues to apply across the board, and I think it's important that we watch out for back-door type of exemptions, the type of thing that can be put in, say with this bill -- does not apply to any practice that's declared to be lawful by the XYZ Commission...because often, the XYZ Commission is something that is primarily set up and controlled by the industry that it is designed to serve or regulate.

A second area that, again, there has been a very definite compromise in the inclusion of a significant number of safeguards is the area of the consumer class action.

I think this area, and rightfully so, is the area that tends to bother most businessmen the most. It's the area where in some of the Eastern states, under Truth in Lending there have been some iniquities. People found that by getting a decimal point mixed up on a credit statement that they were suddenly

subject to millions of dollars in class actions.

So, the first thing that this class action bill doesn't do is deal with the area of consumer credit, where if there have been any abuses of class actions, that's where they've occurred.

The second thing that it does is to limit the area where the class action can apply to a very narrow area. It applies only to those acts in deceptive practices that are innumeraed in the statute or prohibited by rules and regulations of the Attorney General.

So, you can only bring a class action when it's been clearly spelled out that this is a deceptive type of conduct. As such, this is not the kind of broad class action bill that Sen. Mauzy and others proposed during the last session of the Legislature, it's a limited class action provision that has innumerable safeguards for businesses....it only applies to the disreputable business, and I think in the name of safeguard, to add on additional safeguards through amendments would be to add on safeguards to the point of guarding out any class action in the State of Texas.

: What are the safeguards?

DOGGETT : Well, I would say first of all, the fact that the class action only applies to innumerative practices. They can't just be broad on something that someone thinks is deceptive. It has to be specified in the statute or in the rules and regulations of the Attorney General.

The second point is that raised by Gen. Hill to the effect that if the court finds that this has been brought for harrassment purposes, then attorneys fees can be awarded to the defendent, and he has a chance to protect himself.

The third thing is the notice provisions in Section 1755...there's a provision in there indicating that the defendent has got 30 days in which to devise a course to settle this solution. And I think a combination of all these, plus the traditional safeguards of Federal Rule 23 that are incorporated

here provide -- well, really just a very substantial amount of safeguards for any type of harrassment.

So, what I'm saying about the class action provision is that it's an advance over what we have now, which is nothing in the area of class action, it's not a perfect bill, but I think it's a workable one that represents a fair compromise of the interests of consumers, and those that would be affected.

Another crucial provision in this bill is the treble damages section, and this again, though it may not look on the face of it as being a compromise, it is a compromise provision. The original drafts included a minimum damages provision, this is approach that a number of other states have taken. For example, the Oregon Legislature during the last session provided that a violation of its Deceptive Trade Practices Act would yield a minimum \$200 recovery, actual damages or a minimum of \$200.

We felt that perhaps that was a bit onerous, and it provided a simple treble damages approach, and I think it's an important feature, often the amounts taken are small, but they are taken across the state by the same individuals, and the only way to get an effective enforcement of the Act is to provide some type of incentive to seek redress...and that's what the treble damages section seeks to do.

In short, I would say that the interest of the Texas Consumer Assn., and I think of you individuals as -- as representatives of consumers, consumer advocates yourselves, is not to get a bill at any cost. We've had many consumer bills come out up here, and frequently they're not consumer except in name only. So, we're not interested in just getting a bill to have a bill. We're not interested in passing a bad bill. On the other hand, we need some new protection for consumers in the State of Texas, and we're not interested in having a perfect bill which is defeated. We feel that this proposal, though it needs additional analysis and comment, and certainly some changes will be necessary on some points, reaches that middle point that represents an equitable compromise for consumers, some substantial new protection, while at

the same time meeting the needs of the business community.

Are there any questions?

Thank you very much.

CHAIRMAN

:

: Since Sen. Mauzy has gone I'm --

_____ assistant chief of the Anti-Trust and Consumer Protection Division in the Attorney General's office. I am not going to go into the bill unless you have any questions, but I'd like to give you a little background as to where this legislation fits in with legislation of other states.

There are presently about 40 states that have some type of Deceptive Trade Practices Act. They are model Acts which have been sent around to the states and the part of this bill dealing with the Deceptive Trade Practices and the definition follows various forms of these model Acts.

In addition, 37 other states have adopted the type of administrative enforcement procedures that we have in this Act. It has not been found to be a workable situation to have a "separate Consumer Protection Agency" because that agency must always come back to the Attorney General's office to get into court.

Generally, that agency does not deal with licensing, it does not deal with the kinds of regulations that most state agencies are involved with. The actual policing, inspection, and so forth. So, in the past, I'd say 10 years, 37 other states in the United States have found that the best way to handle this situation is through the Attorney Generals office. There are 2 other states that have an individual Consumer Protection Agency and 2 states which have concurrent jurisdiction with the Governor's office and the Attorney General's office.

Additionally, of these states, most of them have the restitution provisions which have been mentioned this morning. There are about 10 states of the 37 which do not, of which Texas is one.

And I would like to point out here

the importance of this particular departure from what might be considered the historical role of the Attorney General's office.

In fact, just last week I was in Chicago meeting with other states Attorney Generals on a current litigation involving Glenn Turner Enterprises, Dare to be Great and Koscot International, which you may be familiar with. This is a various pyramid sales schemes plans.

In Texas, we presently have an injunction against these people from operating in this state, as do many other states. However, in Texas all we have is an injunction. About 2 and 1/2 years ago we tried to get this Koscot stopped in the state through a securities argument and the Supreme Court threw it out. During that 2 year period of litigation, and when we got our Deceptive Trade Practices injunction by the defendants records they had taken \$12 million out of this state. So, we are talking about very large amount of monies, in addition to very small amount of monies.

At the meeting that I mentioned before there were another -- a number of states there that did have restitution powers. Some of these states, California for example, has already collected \$1.2 million for its consumers that have been bilked by this pyramid sales scheme. For this reason, just very shortly to give you one example, it is very important that the consumer be able to get back the money....if you're talking about a \$10 or \$20 or \$100 claim, this may or may not be significant to the family which lost its money, but when you're talking about average investments in this particular case of \$3,000 a person, when there were 300,000 in the United States that invested an average of \$3,000, you're talking about settlements in the area of \$200 million. So, we're talking about very significant amounts of money and things which we do not have the power to in any way

patterned in this bill is very similar to the states that have -- the other 37 states -- the class action provisions are very similar

to those presently involved in California Legislation.

While the -- this bill does not track any one state legislation, because we felt it had to fit our particular problem. This is the background on which some of the reasons why we have the provisions we have, and what other states you may want to look to to -- for comparison purposes. Thank you.

CHAIRMAN : Is -- I'd like to clarify one thing. What all is exempted from this Act now? Specifically exempts the news media.

: Okay, the new media is exempted... the newspapers, unless it is established that they knew. And by establish, we are talking about a court proceeding...a complaint can be filed against them, but they have to -- you know, it's not established by a consumer complaining.

CHAIRMAN : All right, what about pawn shops and loan companies -- ?

: No, none of these people are exempted from the bill in so far as they engage in deceptive acts or practices in trade or commerce. Now, as you know, there is -- there are specific delineated acts and practices, and also the Attorney General's office will have the power to issue more of them. But, we -- we are not talking about, necessarily, their internal structuring as in other licensing bureaus, what qualifications they have to have to engage in one or another businesses...it just relates to their relationship with the consumer. Most -- the main part of this would be in advertising, and in their representations made during the sales. No one else is excluded from that particular -- from this.

CHAIRMAN : Any questions? That concludes the -- the cards that we received. Does anyone here like to testify -- you're for or against this bill -- we have some -- more cards.

If not, then the chair will recognize Sen. Gammage for some corrective amendments.

SEN. GAMMAGE : Mr. Chairman, I move that the --
_____ substitute Senate Bill No. 75, which in reality we've been discussing during the whole portion of this meeting _____
copy of _____.

CHAIRMAN : Any objection? The Chair hearing none this Substitute will be considered. If you would explain the changes....

SEN. GAMMAGE : Everyone on the Committee has received an _____ of the changes _____ in the Committee Substitute. There's one error in that _____ that I detected on page 5, Subsection 19, according to your notes, but it's in reality Subsection 20, and the provisions _____ paid to honor and express _____ guarantee. (voice too far from mike for exact transcribing)...

On page 6, Section 1747, has a provision that _____ and not conflict with the rules and regulations of the Federal Reserve Board. Page 11, line 2, a ceiling is imposed on civil penalties for violations _____ injunctions not to exceed \$50,000 per violation. Page 13, line 13, there's a correction of a typographical error, it says cause of action should _____ course of action.

Page 13, line 15, entire subsection is deleted _____ that it was not needed, was taken care of in present statutes.... _____ reading the bill and preparing _____ statutes _____.

Page 20, Subsection (b) 1 and 2, _____ related to instances in which damage could not be awarded. And a more complete _____ Substitute _____ notification affording an opportunity to _____ settlement prior to filing of suit.

That's it.

CHAIRMAN : Any discussion on these technical changes? The Chair hears no requests -- any motions?

SEN. GAMMAGE : Mr. Chairman, I move that the report _____ Committee that the Committee Substitute _____ Senate Bill No. 75 be reported and do pass and be printed.

CHAIRMAN : It's been moved and seconded that the Committee Substitute be reported favorably to the full Committee with the recommendation that it do pass and be printed. Any objections? The Chair hearing none, let the record reflect that

the Subcommittee is unanimously in favor of a favorable report.

That concluding the purpose of the calling of the meeting, we are -- adjourned subject to such time as the report for this transcript can be afforded us and the report made to the Committee. Thank you.

TESTIMONY OF TEXAS ATTORNEY GENERAL JOHN HILL ON SENATE BILL 75

BEFORE THE SENATE COMMITTEE ON HUMAN RESOURCES

SENATOR BROOKS, CHAIRMAN

February 14, 1973

Transcribed by
Texas Senate Staff Services
May 2, 1977

I, Vivian McVey, certify that this is a true, complete, and accurate transcript of the testimony of Texas Attorney General John Hill on Senate Bill 75 before the Senate Committee on Human Resources of the 65th Legislature and that I, personally, transcribed it as a person responsible for transcriptions of proceedings in the ordinary course of my duties for the Senate.

I, Betty King, Secretary of the Texas Senate and Custodian of Senate records, certify that this is the true, complete, and accurate transcript of the testimony of Texas Attorney General John Hill on Senate Bill 75 before the Senate Committee on Human Resources of the 65th Legislature.

TESTIMONY ON S.B. 75 BEFORE THE SENATE COMMITTEE ON HUMAN RESOURCES
SENATOR BROOKS, CHAIRMAN
February 14, 1973

Tape 1, Side 1

CHAIRMAN : Now we go to Senate Bill 75 which is in the hands of our Subcommittee on Consumer Affairs and the Chair will now recognize Senator Clower, Chairman of the Subcommittee on Consumer Affairs.

CLOWER : Mr. Chairman, last week we had a full hearing on this bill. We published notice of the hearing on Monday and we held a hearing on Thursday. Ample notice was afforded to all. The Attorney General appeared in support of the bill, as well as a couple of people from his staff, a couple of consumer groups appeared and testimony was unanimously in favor of it. I asked at that time for anyone wish to testify in opposition to the bill and no one did. It was passed out of the subcommittee unanimously. Now it appears that there is some people wanting to speak on this again and I think they are entitled to and Senator Gammage has about three amendments in the nature of housekeeping amendments that he would like to make to the bill and I would suggest that since we've heard the proponents of this bill that the--those that want to speak against it speak first when we come back from rebuttal if any is necessary. The Attorney General is here to speak again, and he has got a tight schedule and suggests that we consider him out of order and let him speak first.

CHAIRMAN : The Chair lays out the Subcommittee report on Senate Bill 75 and the Chair will now enjoy the pleasure and a privilege of recognizing the distinguished Attorney General of Texas. (Laughter) I even have got one that goes with his Excellency, The Governor. (Laughter)

ATTORNEY GENERAL HILL: Mr. Chairman and ladies and gentlemen of the Committee, it seems to me that the most helpful thing perhaps I could do for the committee as a whole is to try to summarize the testimony that's given at the subcommittee. The three of you who were there, I know this would be a bore, but perhaps it will help put into the proper context where we are and why we are at this point where there is apparently some additional testimony to be given.

I testified first before the subcommittee and pointed out in substance that under the present consumer law which

we have in Texas which I believe all are agreed it is extremely inadequate to protect the consumer that the Attorney General can file a suit for certain deceptive trade practices which was set out in the act and I think it is extremely important that we always bear in mind in considering consumer legislation we are talking about deceptive trade practices. We are talking about fraud. We are talking about falsehood. So there is nothing in a bill of this sort that any honest business operation has anything to fear. We are not talking about honest error, and you will find as we go through this that there is a lot of built-in safeguards for the 99 percent of the business people in this state who conduct their business in a very, very high quality way.

Now all we can do in the Attorney General's Office when we get these some thirty or forty complaints a day and we are just one agency getting them. Bear in mind that the consumer credit people over here, Vance Kelly, is getting them and all he can do is refer them over to us. He has no enforcement authority. We have some work going on on the local level, sort of catch-as-catch can at the moment. There is some good work I think going on, Senator Bracklein, in Dallas at this moment, _____ on the city level. The point of it all is, that all we can do is file a motion for injunction. We can get a temporary injunction. We can't get any relief for anyone. There is not one thing you can do for a citizen who has been wronged. And that's what he or she is interested in. So that of course just speaks for itself as to the ineffectiveness. Now, one thing under this bill that we could do when we get a temporary injunction, we could also get penalties. I think this would be extremely effective so that if something happens people feel that they have been considered and that they get some type of action. Of course, now private citizens can file a suit today for deceptive trade practice, but he has to prove common law fraud and it is extremely difficult, extremely burdensome, for him when he goes to court and those of us who practice private law know this. We see this come across our desk and it breaks your heart to see a someone who has obviously been wronged but almost an hour of a lawyer's time is about all that maybe they have lost, and yet it is very

important to them, very real to them, and there's nothing that can happen as a practical matter. So we do provide in this bill for the right of a private citizen to sue and to seek treble damages and to recover his attorney's fee. Now, before someone thinks well, that's a pretty strong change (?), bear in mind again that for him to do that he must show that the act has in fact been violated in a very specific way, or that a court has held that a violation has occurred, but he can't just run down to the courthouse because he wants to run, and if he runs down there just because he wants to run and he has found that he filed a frivolous suit, he gets stuck for attorney's fees now. So you may ask, well from whom, who is going to pay? But that's not--doesn't meet the issue whether he can or can't pay for that--at least that _____ it. So this bill puts some teeth into it from the standpoint of the private citizen's right to sue.

Now, I emphasize again. I tried to emphasize in my testimony and I told Joe Longley and Liz Levatino, who you know head up our Consumer Protection Division, we started looking at this many, many months ago, that my attitude is that I want it to be an anti-deception bill, an anti-fraud bill, and not an anti-business bill, and that we don't want to go through this process where you throw everything in and then you bite on the fringes and try to see what you are going to resolve, and a lot of work went into this bill with that theory in mind and with that thesis in mind. And I met with them many times and they met with the retail people and I want to clarify just who we are talking about. Jack Welk, who is the attorney representing the Texas Retail Federation, the trade association consisting of the department, the dry Goods, jewelry and speciality stores through out Texas, and his organization covers about 90 percent of the department, dry goods and speciality stores, met with these--with Joe and Liz all the way through and when we had luncheons and I would come and Jack came to the subcommittee meeting and testified this. We feel that this bill is fair. We feel that it will give the consumer a remedy in this area, and this is the reason that our association is supporting it. This bill is specific and lets the retailer know what is against the law and what

it not. In my opinion, this bill not only sees that the consumer receives protection, but also sees that the retailer is not penalized. And I submit to you in all due _____ to many of my friends that I see here from other industries that Mr. Welk is very, very familiar with this bill and I believe he has a business viewpoint and that his voice could be listened to here, not to speak for others, but simply it ought to be accorded weight when he works that hard and has a business viewpoint and makes that statement. Then Joe Longley came along and tried to point out that this bill put the entire ball game over in the Attorney General's Office as far as enforcement. That's basically where it is and is now, but the theory behind it, we talk about trying to consolidate things in government--to let people know where they go, who do they deal with? And that is what we are trying to do here is create a state agency, administering one law which deals with deceptive trade practices where the businessman and the consumer alike know that this is going to be the place where he can go, or should go, and that is the reason we tie the FTC regulations to it--so that they are not inconsistent, that the state law cannot be one thing to the businessman and the federal law the other. That drives you crazy trying to run around trying to find out what the law is that you are supposed to about it and that is one reason that we made it that way. It's the same situation with the--I talked to Sam Kelly with the Consumer Credit Commission--we have not gone into this thing idly--certainly, I haven't--and he said he thinks it is fine for it to be there. All they can do now is investigate anyone. They talk in terms of the insurance regulations. I respect the fact that the Insurance Commission has some very good rules over there with reference to advertising in the insurance field, but they don't have any real enforcement. However, where today is anyone going to get any relief if there is a false advertisement in insurance? How are you going to get any relief from it? Now, this bill builds in wherever it comes from or whatever source it comes from an opportunity for there to be some enforcement and some relief. We have--I believe it's either--Joe, has it gone in

yet, or, Liz, that if there is anything inconsistent in this bill with state regulation that it would not--we don't want inconsistency--it is not our effort to cause confusion. It is our effort to try to solve the problems fairly to the business community and effectively to the consumer so that the people in this state could feel

_____ from the government when they have losses and have consumer fraud, can feel that they can get some tangible relief.

Now, they talk about our--I think if you will look at the laundry list, so-called, or the dirty laundry list, you won't find but three or four new things on it that are not already in the law. We talk about odometer rollback. We talk about telling somebody that there is a warranty that there really isn't. And we talk about pyramid sales things--three injunctions have been issued recently just on the broad generalities that it is clearly fraudulent. We can't tolerate and shouldn't tolerate the people who contrive to operate businesses to deceive the public. That's their business is to try to deceive--tell people they are getting one thing when they are not and on that _____--that's all I want this bill to deal with and not to create any problems for the 99 percent of our business community that we know don't deal that way and are not trying to deal that way--up on top of the deck all the way. And I think when you build in the restraint we have of honest error into this bill and when you build in the opportunity for restitution when there is harrassment and you give the citizens of this state on class actions--they have 30 days--if it ought to be 60 days, make it 60 days--I am not wedded to a date. But I say to you that unless the people of this state through their Attorney General who is interested in their consumer problems and seeing that they get some relief and through their own ability to file a class action suit where there is a clear violation or their own individual cause of action for their remedy we are not protecting the people of this state as we are supposed to do, and I urge you, please, to give careful consideration to the bill. Thank you very much.

CHAIRMAN : Any questions of the Attorney General?
Senator Andujar.

ANDUJAR : Please, sir, would you explain to me? Are

there powers, or are there not powers in the Insurance Commission at the present time to prevent fraudulent or deceptive advertising by the insurance industry?

ATTORNEY GENERAL HILL : Senator Andujar, I am not familiar with each and every one of the lists of deceptive trade practices in the insurance code. There are probably people in the room that are. I am not going to pose as knowing each and every one of them. The impression that I have is that they have got a pretty good list, and that there has been some effective work done in this regard. I think Senator Blanchard is to be commended for example for what he undertook in the area of hospitals insurance here some two or three years ago where there was much, much deception being practiced. So I would like to answer you by saying, let's assume for a moment--I think this bill probably covers some areas that that does not. Let's assume for a moment that it doesn't. It seems to me that what this bill does do since it would not be applied in--that subsubstantively would not be applied inconsistent--is that it gives a sort of relief or remedy. In other words, if that person who has been deceived by an insurance ad or has been sold a bill of goods in the insurance policy from the standpoint of the way it was presented to him. He didn't get what he thought he was going to get--that he can come to the Attorney General's Office and an injunction can be issued and penalties can be assessed. I think that is the difference.

ANDUJAR : You wouldn't be willing then to accept a phrase of exclusion for the insurance industry?

ATTORNEY GENERAL HILL : I would not favor an exclusion. I think it is hard to justify in principle passing a broad-base consumer bill and exempt that product. I don't think that it is justified. No Ma'm.

: I think the Senator's question may partially be answered to in an amendment that has been recommended by the Subcommittee and _____ and we will take it up in just a moment. That relates to the conflict of regulations between the board and other agencies (?).

ANDUJAR : May I ask two questions--perhaps they

are legal--I just don't understand them, and one on page five, we refer to an implied warranty. You would be guilty--see here--on my copy page five, Section 20, you would be guilty of failure to honor, express or implied warranty. Now, I visualize a man trying to--selling me an insurance policy, but--and I think that it means one thing, but I come back later and he says, no, Betty, I didn't say that. It means so and so. Now, what does implied warranty--how would you prosecute a case on an implied warranty?

ATTORNEY GENERAL HILL : Well, obviously it is much more difficult than an expressed warranty. You buy a sewing machine and they say to you, you are going to make good now. We are going to guarantee everything about this sewing machine. So don't you worry. You just buy the sewing machine and if anything goes wrong with it within a year, well, you bring it back. Well, the bobbin goes wrong and you bring it back, and they say, well, I really didn't mean the bobbin. That's the sort of--you are getting into expressed warranty--that which is spoken--that which is written. Implied warranty, of course, is a warranty of _____, fitness that it is suited for the purpose for which you bought it. There is nothing to say it (?).

ANDUJAR : It is not the purpose to which I might have put it.

ATTORNEY GENERAL HILL : To which you might have put it. Now this actually goes into--these matters frankly have a very low threshold as far as I am concerned in this kind of a bill. You are basically on a point can be extremely legally important but it is normally battled out in a courthouse arena where something really bad is happening in implied warranty cases or product liability cases. So the feature of implied warranty I would agree with you is not as significant in a consumer deception bill as the express warranty, but I think we need it. It doesn't hurt anything.

CHAIRMAN : Are there other questions of the Attorney General?

KOTHMANN : I would like to ask one.

CHAIRMAN : Senator Kothmann.

KOTHMANN : General, let's just assume that Rancher Number 1 is advertising bred cows for sale.

ATTORNEY GENERAL HILL : Come again.

KOTHMANN : Bred cows. I am talking about something of what I understand a little bit about. Bred cows for sale. And Rancher Number 2 buys these bred cows. But they turn out they don't have a calf after about nine months, and Rancher Number 1 said well, I had a bull with them. I thought they were bred. How would Rancher Number 2 come back at Rancher Number 1?

ATTORNEY GENERAL HILL : Well--

KOTHMANN : Or am I being ridiculous?

ATTORNEY GENERAL HILL : No, no, you are not at all. As someone who likes ranching (?) and who could get into that very track. (Laughter) I would say that I'd really want to--I think it would depend, Senator Kothmann, on what I really did. Now, if I knew that the cows really were barren and went about it in that way--this is not altogether easy to prove--but I think on the other hand you may have honest error. I think there is a fact question. I would not say that you cannot have a situation that can arise under this bill, where your road map can't be just a little bit unclear--I think it would be preposterous to say that--that you can't envision in this question that the Rancher says on one hand, well, I, you know, did he pregnancy test them? You know a lot of other fact situations that you would have. It gets back, Senator Kothmann, to the basic question of whether there is practiced deception. And I think if this kind of thing--and you are obviously going to have and under the best of bills, circumstances where there are gray areas (?). You would have a question of fact to be resolved on was it an honest error, or was it practiced deception? And I think that is the way you would have to answer your case. Your concern, we would be--as far as our philosophy is concerned under the bill, we would be looking at the practiced deception--the clear-cut case of practiced deception.

KOTHMANN : Well, I am for consumer protection. Let's take another situation where a rancher has--Number 1, Rancher Number 1 has hereford cattle bred to hereford bulls in these what I have, and half the herd--the calves come out black. And an angus bull jumped the fence--black bull _____ jumped the fence. (Laughter) Now what kind of position would that--?

ATTORNEY GENERAL HILL : I sure think that's an honest error.
(Laughter)

KOTHMANN : But the reason I asked that because I
have seen these things take place.

ATTORNEY GENERAL HILL : We have seen that, haven't we? Well,
suppose you get rid of the black bull that has ruined all _____.
(Laughter)

KOTHMANN : Okay, I just want to know, but these things
do happen. I am for consumer protection.

ATTORNEY GENERAL HILL : When I sat down in this seat, I assumed that
the Senate of this State had a right to question me about anything
they wanted to. So you go right ahead.

CHAIRMAN : Are there other questions of the Attorney
General? Senator Meier.

MEIER : General Hill, as I read through the proposed
bill, frequently in many sections there are language that indicates
that under class actions that either the consumer protection division
or the district attorney or whoever may be acting as the plaintiff
of the lawsuit might also be serving to represent individuals as
a class in addition to representing their main client being the State
of Texas. I know you've considered that matter and I wonder if you
can enlighten those of us as to whether or not this is an acceptable
situation both in regards to your constitutional duties as Attorney
General and as regards your ethical duties as an attorney?

ATTORNEY GENERAL HILL : Referring as to the local people
doing it, I think one of the great advantages of this bill is that
the bill provides the district and county attorney will help in this
because we obviously shouldn't and can't do it all and that we would work
and cooperate with them and you keep it local that way. Secondly, the
provision means that if you have gone in as the Attorney General or
as a district or county attorney in a suit where you are simply speaking
in injunction with penalties that you are authorized to request
the court to also with that action give relief to the identifiable
consumers that--I stress--identifiable consumers who were clearly wronged
about what you are enjoining for which you received the penalties.
It is up to the court whether to grant that as an actuarial relief

or not. The other way to attack the problem is by an out right class action on the part of the people. I see nothing--not only do I think it is not unethical for the Attorney General if he is in court with a clear violation and you happen to be one of the people that got harmed by it to add it to court by the _____(?) in addition to penalties tell Mr. Meier because he has a provable claim--I think it is my duty to do so.

MEIER : Well, carry that one step further. Let's assume that we are dealing with a hospital insurance policy, and the aggrieved person is concerned that he--that he bought a policy that had pre-existing--that covered him with pre-existing illnesses, but when he got the policy and got to reading it, it in fact only covered illnesses occurring from the-- _____ of the date of issuance of the policy. And as I interpret it, if you had the other prerequisites met and the consumer protection agency then decided to go ahead with a pursuit of obtaining some kind of an injunction or civil penalties as against the company or at the individual's agents or whoever they were working with the company that would have caused this matter to arise if you had it while it was _____. Say you've got fifteen violations in one year or whatever that you could talk to other people that bought the same policy and thought the same thing happened. Then, in effect, aren't you acting as an attorney on behalf of those individuals in a situation where the attorney general has never before acted as representing individuals.

ATTORNEY GENERAL HILL : Say the bill is not innervated of course is incorrect. But it is innervated only in Texas--not only in Texas but the 37 states that are already so far ahead of it in this, have these kind of remedies but yet it is different from our state, but Senator Meier let me stress in your example. It is not the purpose of this bill--let's say that the person that the policy essentially provided that if you did exclude pre-existing illness and most of them do, and it wasn't advertised someway to the contrary, he just got what he bought. You know, if we are not to the point where we can go in and have some civil lawsuit that you and I might be used to in the real civil _____ where there just somebody comes in and says

well, I want to file a lawsuit because I didn't understand the policy that way.

MEIER : That's wrong.

ATTORNEY GENERAL HILL : There would have to be a violation of this act and as deceptive trade advertising behind us. Now, if the advertisement came out in the newspaper and said you buy this policy and you send in your five dollars and if you do, you are going to get a policy that will cover you regardless of previous illness. That's what this bill means-- deals with. Then yes, the answer to your question is yes, because you have both of them. You have the falsity of the advertising which is the basis of your allegation for injunctive relief, not to kill the policy, but to kill that ad-- to kill that deception so it can't be practiced any longer and seek penalties for doing it, and at the same time if the court is inclined to give relief to the person who suffered injury as a result of that deception to make the distinction _____.

: Mr. Chairman.

CHAIRMAN : Senator _____.

ATTORNEY GENERAL : Well, I was better fifteen minutes ago.
(Laughter)

: Could I have helped if I had of been here?

ATTORNEY GENERAL : Well, we will soon find out if you don't ask me anything. (Laughter)

: General, in Section 17.52, you speak of relief to consumers, B(1) on page 13 allowed for treble damages. Over in Section 17.53 on page 14, class action down in Section B you allow also for punitive damages, again for attorneys fees and court costs. Explain to me whether or not a person seeking relief whether it be class action or individual or both can also not only receive court costs, attorneys fees, treble damages, but also punitive damages?

ATTORNEY GENERAL : That is correct.

: So treble damages and punitive damages on top.

ATTORNEY GENERAL : That is correct.

: I always thought treble damages were pretty punitive.

ATTORNEY GENERAL : Well, the theory of course that arose out of anti-trust is--it is a penalty, Senator. It is a penalty for wrong doing, and the punitives of penalty is for wrong doing, and they are cumulative from that standpoint, and it _____ (?). My feeling I think in the main is--you're talking about are not dollarwise--you are talking about the individual situation dollarwise or not, Senator Harris, very consequential most of the time and three times is not all that consequential and punitive damage I think has to be and would be by law reasonably related to your actual damages. The attorney's fee has to be based upon work done so that you can't show both facts. I don't think that it is out of line and that we can _____ (inaudible due to noise into microphone). The truth of the matter is it's the type of thing nobody likes to talk about because you like to see none of it ever happen and you would hope that it never was misapplied, that it would only apply every time that you and I say, hurray, it should have been applied.

: Still operating on a _____ (inaudible) income?

ATTORNEY GENERAL : Well, I think we are going to have to get away from some of that in Texas and in the nation and I think we have moved away from it because the old idea of _____ beware, life it too much coming at people. There is so much complexity, there is so much--frankly, Senator Harris, deception in practice in the manner and ways in which services and good and products, you know, _____ (inaudible due to noise in microphone).

HARRIS : (Inaudible due to noise and confusion in microphone).

ATTORNEY GENERAL : Well, I could--fraud _____, Senator. If we have to have it, I hope that it is changed, it won't hurt the position, but I know you share my concern on basic things _____, but I can't separate fraud at one place from another. And I would be _____ to say, and I have tried at best to say that--we are lucky in this state that in the business operations and the broad aspects that you and I know to deal with and our wives and children deal with--we just don't have to bother with it or worry with it. And that's why I think that a lot of the business people are supporting this bill is because when they really get hurt is when the law is unclear

and when it is bad and when the public gets confused when there is a lot of anamosity builds up between customers and there is no relief in sight then a lot of old bad lawsuits get filed and they don't know who to come to and until you spell out the deception clearly and make it specific, I really believe this is one of the finest drawn pieces of legislation from the standpoint of craftsmanship--I am talking about clarity--of any that I have ever seen. So I think that is _____ so that you don't go over in areas--sure pyramid is awful easy to see and I agree with you. It is clear-cut, you get at it, you enjoin it, and nobody likes it. But you are obviously concerned about as I am is that people who are not that are really working from _____ to _____ in trying to put out their product and doing a good job don't hurt with this bill, and I don't think they will.

CHAIRMAN : While you are here, Mr. Attorney General, I would like to go ahead and let the committee consider these three amendments because--you commented on one of them and you might want to comment on the others. Senator Gammage sends up Committee Amendment Number 1 and I'll recognize Senator Gammage to explain it.

GAMMAGE : Mr. Chairman and members, Committee Amendment Number 1 is simply a housekeeping amendment. If you will turn to Page 5 of your Committee Substitute, down in Subsection 21--"Acts or practices declared to be false, misleading or deceptive acts or practices"--and in here you insert the words "in trade or commerce by regulation of the Consumer Protection Division under this Sub-chapter." On page six, Section 17.47, Subsection A at the end of the first sentence, insert the words "in trade or commerce."

CHAIRMAN : Excuse me. Where is that--Section 17.47, Subsection A--whereabouts on page--

GAMMAGE : On page six, Section 17.47, Subsection--17.47A. The end of the first sentence after the word, "practices." Between the period and the word "practices." Page-- "in trade or commerce" should be inserted there.

CHAIRMAN : I got it.

ATTORNEY GENERAL : And you have your insurance thing on that too? _____ to show the inconsistency. (?).

CHAIRMAN : Yes, sir. We will get to that in a minute.

ATTORNEY GENERAL : May I be excused if it please the committee?

CHAIRMAN : Thank you, General.

ATTORNEY GENERAL : And thank you so much. It is nice to see you again.

CHAIRMAN : Thank you for coming over again.

Okay, Senator Gammage has explained the Committee Amendment Number 1 to the Committee Substitute. Is there objection to its adoption? The Chair hears none. The amendment is adopted.

Now, the Chair lays out Committee Amendment Number two to the Committee Substitute and recognizes Senator Gammage.

GAMMAGE : Mr. Chairman and Members, if you will turn to page 7 of the Committee Substitute, this amendment relates to the _____ of the bill on Subsection (d) on that page where the bill provides that 100 persons are allowed petition for issuance of regulations. This amendment allows the state agency to also petition for regulation without requiring the signature of 100 persons. Under Subsection (d), second sentence, the language should read as follows: "The petition must be--(in here, insert the word "either" between "be" and "signed") signed by 100 interested persons--(and here insert the language--"or submitted by a state agency board, or commission." Just continue on and supported by evidence that a particular act or practice et cetera, et cetera.

CHAIRMAN : Is there objection to its adoption? The Chair hears none. Committee Amendment Number 2 is adopted.

Now the Chair lays out Committee Amendment Number 3, and recognizes Senator Gammage.

GAMMAGE : Committee Amendment Number 3 is the one the Attorney General--(inaudible).

: Mr. Chairman.

CHAIRMAN : Yes, sir.

: I know we have already adopted this amendment but I missed what he said was going to be inserted after the word "must be" or "signed".

GAMMAGE : Must be "either" signed or submitted by --

: Either, either.

GAMMAGE :--or submitted by a state agency, board, or
commission.

: --or submitted. Okay.

GAMMAGE : Number 3, Mr. Chairman, as you pointed out
is the one referred to by the Attorney General during his testimony.
And Number three strikes all of Section 17.51 on page 12, and inserts
a new section and provides that--

: What number?

GAMMAGE : That's right--17.51. New 17.51 will be
inserted here which provides that regulations issued by the Attorney
General's Office _____ (inaudible due to cough and noise in
microphone) false, misleading, or deceptive may be in conflict
with rules or regulations issued by other state agencies." Also
it makes it clear that this bill in no way restricts or prohibits
other agencies to issue their rules and regulations. If you would
like I could read you the specific language.

MEIER : I would like to hear it.

CHAIRMAN : Senator Meier would like for you to
read it.

GAMMAGE : Can you hear me all right down there.

MEIER : You are not going to hand us all a copy
of it? There is no sense in reading it if you can hand us a
copy.

GAMMAGE : The copies are being passed.
I will read it aloud for the record. Section 17.51--this is the
new amended substitute for that section. "Conflict of Regulations:
The regulations issued by the Consumer Protection Division under
this sub-chapter may not be in conflict with rules and regulations
issued by another state agency, board, or commission of Texas, pursuant
to their constitutional or statutory authority. Nothing in this
sub-chapter prohibits or limits the state agency, board or commission
of Texas from issuing rules and regulations pursuant to the authority
vested in the agency, board or commission by statute or the constitu-
tion."

CHAIRMAN : Is there any discussion or any questions

upon the amendment? Is there objection to the adoption of the amendment. If not, the Chair hears none--the Committee Amendment Number 3 to the Committee Substitute is adopted.

Now Senator Braecklein sends up an amendment which will be numbered Amendment No. 4 and the Chair recognizes Senator Braecklein to explain the amendment.

BRAECKLEIN : Mr. Chairman and Members of the Committee, referring to page 12, Section 17.50 what this amendment does is to add Section C which merely includes why two professional services rendered for a fee by a professional license--under two articles which--means doctors and lawyers.

PATMAN : What about dentists and people like that? Are they under that?

BRAECKLEIN : I don't know whether dentists are included under this or not. (?)

PATMAN : Is that the Medical Practice Act?

BRAECKLEIN : Yes.

PATMAN : Thank you, Senator.

BRAECKLEIN : None of these people advertise anyway? Do they? They are not supposed to advertise anyway.

CHAIRMAN : Is the amendment is acceptable to the author? Is there objection to its adoption? The Chair hears none. Amendment No. 4 is adopted. Are there other amendments. If not, then we will get back to our schedule of witnesses. The Chair will now call Mr. Gene Fondren--simply because he has a flight schedule to keep. If the other witnesses have similar transportation problems, just notify the Chair and we will try to get you called as quickly as possible. The Chair recognizes Gene Fondren.

FONDREN : Thank you very much, Mr. Chairman, and members of the Senate Human Resources Committee.

(End of Side 1 of Tape 1)

--I would like to comment here, Mr. Chairman, if I might, that I was present at the Subcommittee hearing, and Senator Clower did extend an invitation for those present to appear and testify. Due to my own

lack of resources I was not prepared to testify at that time and I do appreciate this second opportunity here before the full committee.

The Texas Automobile Dealers Association is comprised of 1450 franchise new car dealers who do business throughout the State of Texas. According to the U. S. Department of Commerce retail automobile sales in Texas in 1972 total \$4.5 billion, and is second only to food products in total dollar volume sales in Texas during that year of 1972. Because of the amount of retail volume involved in automobile transactions and more particularly I think because of the importance of automobiles to each individual who purchases one, we in the automobile business are very much in the spotlight in any manner relating to consumerism or to consumer affairs. I am sure you will agree with me that no business or industry is cussed or discussed more than the automobile industry in terms of our shortcomings and our failures. Regrettably, some of the complaints about our products, about our ability to service and maintain that product or justify it. In working with Texas Automobile Dealers I can assure you that they are neither unaware nor unfeeling about consumer problems. I will not pretend to you that the attention of the federal government, the state government, and the local government, the city and city ordinances throughout this state and country--I won't pretend to you that these activities have not enhanced our awareness of the consumer problems in our business and in our industry.

I will say to you at this time that we in the automobile business are doing many things. We are taking many affirmative steps to improve the handling of our product in its service and in its maintenance for the benefit of the public. We can certainly recognize in the satisfaction of our customers that it produces the most profitable, the most efficient, certainly the most rewarding automobile business activity. It is therefore important for me as a representative of the automobile retailers to come to you and come before you in an attempt to discuss with you Senate Bill 75 as it relates to our business.

Filing with the committee here today, I registered as being opposed to Senate Bill 75. I did that because

the form leaves no middleground alternative. I either had to indicate that I was for the bill, or against the bill. Because I am opposed and will speak against some portions of the bill, which I hope this committee will see fit to delete or to amend, I do want you to know that there are many things about Senate Bill 75 that our association does and will support.

As has been indicated to you, there are many provisions which I believe and which others believe will insure a greater consumer protection in Texas than we enjoy today. We agree entirely with the authors of the bill and with the Attorney General of Texas that the present deceptive trade practices Act which does not permit a statutory method of consumer recovery is inadequate for good consumer protection. We agree with General Hill that the common law remedy for recovery under proof of fraud in today's society and today's marketplace is perhaps too unweildy and not sufficiently responsive to the needs of the individual consumer, and such remedy, of course, as has been indicated to you as you know is provided in this bill. Also, we do approve and we do agree with the extension of a list of specific deceptive trade practices contained in the bill. For example, the one that pertains directly to our business and industry is one that we are in agreement with. We agree that the act of odometer tampering is and should be clearly and statutorily made a deceptive trade practice. Our Association has worked at both the state and federal level with this problem and as many of you may know, on January 20, a federal statute went into effect which made it against the law against the federal law to tamper with or disconnect an odometer. This federal legislation which was authored by Representative Bob Eckhardt of Texas--he was the principle architect sponsor--was supported by and sponsored by and urged by our National Automobile Dealers Association.

In addition to recognizing the efficacy of these stated specific practices, we also agree with the Attorney General and his testimony before the Subcommittee and with the authors of the bill that it is proper and reasonable that a statutory provision be included in the bill for consumer recovery for violations of the

act. We do agree and do believe that the Committee Substitute as recommended to the committee by your subcommittee, and the changes therein makes substantial improvements in the bill and we commend that effort. We particularly think that it clarifies some sections that we were disturbed about and will now not be necessary to take your valuable time in discussing a number of matters that we originally had some concern about that have been clarified and much improved we think in the committee substitute.

Now, I have said about all I can say about those portions of the bill which we do support and which we do agree with. We agree with the specific delineated--we think it is carefully and properly drawn--specific deceptive trade practices act outlined in the bill and with the right, with the statutory consumer protection of being able to bring an action under this statute by the consumer. There are other matters though that I hope the committee will give careful consideration to. There are five areas which I would like to take a few minutes to discuss with you if I might, and if you will allow me to do so.

First, we would like to offer for your consideration several amendments to the bill. We don't think they are a tremendous significance in terms of seriously affecting the purpose of the bill, but we do think they are important for your consideration. We would like to talk to you briefly about the incorporation of the federal rules in the bill, about the damages and the penalties for writing the bill, about the delegation of legislative power in the bill, and finally, about the class action provisions of the bill.

In terms of proposed amendments if I could call your attention to the Subcommittee report on the bill of the Committee Substitute on page 5. Senator Andujar, this would relate to a question that you asked the Attorney General about implied warranty. And I call your attention to Number 19, so-called laundry list on page 5 of the bill. If I might I would ask my colleague, Mr. Sap, if you would, to hand out copies of the proposed amendment to the members of the Committee. I think the reason my throat is so dry is that this is the first time I have appeared before the State

Legislative Committee except as a voting member and I assure you there is quite a difference. (Laughter) I believe all of you now have copies of the proposed amendment on page 5, and the purpose here is to attempt, and we think it does not in anywise weaken or invalidate the provision written by the authors of the bill and the drafters of the bill, but an attempt to have some certainty and consistency with regard to implied warranties. We are suggesting that Number 19 be admitted to limit or to provide that nothing in this sub-chapter shall be construed to expand the implied warranty versibility as defined in the Business and Commerce Code which, of course, is already on the books. I will be glad to answer any questions or furnish any additional information. I don't think it does any serious harm or change the thrust of the bill at all.

: Is it _____ to get a copy?

FONDREN : No, I don't believe it will. Did you say that Senator Ogg or Senator Mauzy wanted a copy?

The second amendment that we would like to submit to the Committee for its consideration deals with Section 17-50. I will get the page number here in just a moment. This is on page 12, and there has already been an amendment to I believe to add a new subsection (c). We propose to add a subsection (c) here. Of course, it would have to become Subsection (d) if it were adopted by the committee, and the purpose here is as you know, exemptions are made with regard to rules and regulations of the Federal Trade Commission-- those accepted practices, those authorized practices and the suggestion here is that the exemption will be granted for statutory permitted both federal and state statutorily permitted practices. It simply says, "An act or practice required--(It should be "are" (?) specifically permitted)--I apologize for a typo error--a buyer under federal statute, rule or regulation or under state law-- we do not think that this is any particular problem with the bill. It is simply another conformity or consistency proposal which we submit for the Committee's consideration. Sorry.

: What was that wording that you changed here?

FONDREN : It would add a new paragraph.

: I understand that you said there was a typo error someplace.

FONDREN : It reads, "An act or practice required "to" specifically. It should be "are" specifically permitted. (?)

: Yes.

FONDREN : --by statute--
: Right. I am not sure but what that Section 17-51 doesn't take care of this part.

FONDREN : It may do it, Senator. We thought about that and agreed that it might. We felt like this would be no particular harm that could possibly come from an amendment such as this and make it abundantly clear that you could be punished for complying with the statute as well as rule or regulation. (?)
(Due to noise and confusion it is impossible to get all of verbiage)

If I may proceed, Mr. Chairman, or the committee, other amendments that we would ask you to consider would be page 19 of the bill and Section 17-54. Section 17-54 begins much earlier in the bill. It begins on page 15 and it is the section of class action. On page 19, if you look about the middle of the page, just before the beginning of a new section 17-55, we propose the addition of two sections, (l) and (m) to 17-54. Those are being--does everyone have one? We would propose first a new section (l) or a new paragraph (l) to Section 17-54 which would--the purpose of which is to prohibit solicitation of clients or fees or expenses in promoting a class action suit except under the guidelines of communication approved and determined by the court of jurisdiction over the class action itself.

: Is--Mr. Chairman. Is this a common set of protective clauses that apply to--is this a common set of protective clauses that apply to class action suits and other _____?

FONDREN : No, it--I can't answer that, Senator. I haven't had that much time to research the-- The purpose of this is to attempt to prevent an abuse which might arise if there were an unscrupulous attorney or person, and being an

attorney I am sure there is not any, but if there were, who might use the class action as a vehicle or device to do what we now refer to in other types of cases of ambulance chase, this would limit the ability for that abuse to develop under this bill if the committee determines that a class action remedy should be made available to the consumers of Texas under this bill.

CHAIRMAN : Senator Gammage.

GAMMAGE : This--(inaudible due to cough in microphone) _____ under (1) here, you have every potential and actual class action, and then you have down here a little farther--"not a formal party to the action." Well, if it is just "potential," how can there be formal parties _____?

FONDREN : There obviously couldn't be, Senator, and I am sure that this language can be greatly improved upon as most language can. The purpose here simply is prior to the filing or during the course of action under a suit is to prevent _____(?). If we haven't worded it well, that's our fault, of course, and I am sure it can be improved. But that's the purpose of it.

GAMMAGE : Is it to your knowledge, is there any other jurisdiction that provides for action similar to the proposed bill here that has any provisions in it like this?

FONDREN : I have not read any.

GAMMAGE : Did you perchance get these out of the federal class action rules?

FONDREN : No, I did not. The federal rule, Class Action Rule 23, may have it in there, but that is not where this came from.

GAMMAGE : Judge Estes frequently issues orders like this.

FONDREN : Pardon?

GAMMAGE : I said, Judge Estes in Dallas issues orders like this--class action cases.

FONDREN : The purpose of it is I think is obvious. Any further questions on Section (1)?

Section (m) that we would propose a new Section (m) which would simply prevent a multiple of class action

suits to be developed at the same time. It simply says that if a class action has been commenced, all subsequent class actions seeking the same relief, basically the same relief when we have the same people, shall be stayed pending disposition of the initial acts. We certainly don't think that involves the purpose of the bill.

GAMMAGE : We may even have different fact situations.

FONDREN : Well, I don't know how you might improve on it. We say, on behalf of the same--or substantially the same class of consumers in connection with the same consumer transaction. I suppose--

GAMMAGE : --jurisdiction--(inaudible)--this is filed in the district attorney's office or filed in Houston, and they have one in Dallas--where they couldn't be joined.

FONDREN : That would be exactly what we would purport to stop, Senator Gammage, simply because the defendant--we think most of the defendants in Texas under this bill simply do not have the wherewithall and the ability to defend class action suits all over the state.

GAMMAGE : The problem here we might have to _____ some evidentiary (?) problems--one might be filed a month ahead of the other one. The second one filed may proceed to a rapid disposition while the first one may be years.

FONDREN : Well, we simply would not propose to deny the right of the second one to be filed, but simply to stay it until he defends himself of the first one filed.

GAMMAGE : I wonder if--wouldn't it be appropriate to give the judge in the second case the opportunity to stay the proceeding. He would have that right anyway, would he not?

FONDREN : It is discretionary already.

GAMMAGE : Yes, I would think so. You don't think that's enough protection though?

FONDREN : No, sir, I don't. I really think the defendant should be limited to one class action. A class action suit

is a very serious and far reaching remedy in the first place. Because it is such a remedy we firmly believe that the committee ought to consider at least limiting to the _____ (inaudible due to cough in microphone) --class action defense at the time. That is why we proposed this for your consideration.

MEIER : Mr. Chairman.

FONDREN : As you know any number of individual suits could certainly be brought. This would not in anywise limit the right of an individual to have a suit brought or bring suit in his own behalf.

MEIER : Mr. Fondren, in looking at your _____, I am --from what you said a little earlier, are you--are what you trying to do here is to prevent multiplicity of actions in different locations and different courts that deal with the same kind of transaction or do you mean the same transaction? You said the same consumer trade transaction. Would that mean to you the same--people buying cars from Chevrolet dealers in Fort Worth might file a deceptive trade practices class action, claiming to represent all purchasers of same model car, and they filed their lawsuit first, would you interpret this to mean that a similar lawsuit on the same type of transaction could not be filed in Houston, San Antonio, Dallas, or any place else?

FONDREN : No, sir, I wouldn't. I think it would be limited to, unless the same defendants were involved in all the different suits.

MEIER : If you are talking about filing against Chevrolet dealers, they are probably going to sue General Motors, don't you reckon?

FONDREN : I would think if you wanted to get broader than the Fort Worth dealer, you could sue General Motors or the Fort Worth dealers if there were several. The point would be that one group of complaints, plaintiffs, their attorney would file a class action. Then a different group with a different attorney perhaps to file another class action involving the same transaction, and this is what we would attempt to avoid. We would not attempt to say that

it is actually filed against a group of Fort Worth dealers involving transactions in Fort Worth, but if the same kind of transactions but different had transpired in Dallas, that those Dallas ones could--

MEIER : But different dealers and different people that live in Dallas.

FONDREN : Right. They would have a right to sue in a class action (?)--(not clear due to overlapping voices).

MEIER : One lawyer rounded up a bunch of clients. What I am saying also, don't you in effect have--don't we have under the Texas rules of Civil Procedure the very same rules that your-- amounts here to much more clarity that it merely says that if there is a representative class involved and it has been so determined that you have a representative class involved and the court on motion of the defense counsel could--

FONDREN : (inaudible)

MEIER : Yes, just stop all of completing the other actions or else consolidate them all into the same case.

FONDREN : I agree and I don't think there is anything in this that prohibits consolidation if you feel that that is the case, th I think that certainly could be clarified. The language might "shall be stayed or consolidated" be used. That is, Senator Meier, what we are trying to avoid under this--

: I think what Senator Meier is trying to point out, Mr. Fondren, is that this is already been provided for in the Rules of Civil Procedure. Is there any necessity in incorporating it in the statutes again?

FONDREN : Well, perhaps it is as you suggest provided for in the Rules of Civil Procedure, but we are creating here a new statutory class action that does not now exist and we think that it ought to be clearly put out in--set out in the statute in this manner. If it is covered by the Rules of Civil Procedure, certainly no harm has been done in duplicating it, but since we are creating a new action, a new cause of action in this state and in the bill, we would appreciate it if the committee would

consider setting it out clearly in the bill.

MEIER : Well, Mr. Fondren, I want to ask you about that. If we are here in effect creating a new substantive right, substantive cause of action--that is what this bill does--it creates a substantive cause of action, and if within the very statute that creates the substantive rights, you have a limitation in terms of procedural rights to initiate the action. Then isn't it a rule of statutory construction that the specific language in the substantive law that creates the cause of action would govern over the general rules and the Civil Procedure?

FONDREN : Yes.

MEIER : So we would be changing the practice if we adopted this Section (m), wouldn't we?

FONDREN : Yes, I believe you are right, Senator, I think that is the proper conception.

CHAIRMAN : Any other questions of Mr. Fondren?
If not,--

FONDREN : I am not through, Senator, unless you wish it. I do have a few other things that I would like to comment on.

At several points in this proposal in this bill before you, reference is made to federal rules. The first one being on page six of the bill which would require the courts to the extent possible to be guided by Subsection B of the bill and in addition, include the interpretations given by the Federal Trade Commission and the Federal courts to a referred to section of the Federal Trade Commission Act. Let me hasten to state to the committee that I have no expertise on the Federal Trade Commission Act. On page 12 of the bill under paragraph B, if I read it correctly, this represents--the last half of that provision represents an incorporation in effect of the rules and regulations of the Federal Trade Commission. Now, I heard General Hill's testimony that there is a desire to conform with the Federal Trade Commission so that we will have one body of law. I am concerned that these do represent an incorporation by reference of the Federal Trade Commission rules and regulations, and of course,

interpretations thereof, which I think all of you will agree is a sizeable body of law. Again, on page 17 of the bill, the language refers to the use of Rule 23 of the Federal Rules of Civil Procedure, at least decisions of the federal court's interpretation of Rule 23. The bill itself lays out in the procedural layout in the bill pretty much tracks Rule 23. It does seem to me that it is an additional burden certainly on the lawyers of Texas to attempt to work under this legislation, and to apply the federal decisions under-- all the federal decisions under Rule 23 of the bill. Finally on page 26 and 27 the references act at the top of page 27 but the paragraph begins with the bottom of 26. It provides that a civil investigating demand may contain a requirement of disclosure of documented material and it would be discoverable under Rule 26 of the Rules of Civil Procedure. Rule 26 is a discovery rule which goes in a number of respects substantially beyond the discovery rules under the Texas Rules of Civil Procedure. For example, it does allow the production of the insurance agreement and the fact of the existence of insurance to be produced by the parties under discovery which unless it has been changed lately is not the case under the Texas rules.

: I think the Supreme Court just changed that, didn't they?

FONDREN : If they did, I am not familiar with it.

MEIER : Did the effective complete right after the first of this year? (?)

FONDREN : Yes, January 1st of this year it became effective.

: Our _____ of insurance.

MEIER : It is covered with the same federal and state practice act. (?)

FONDREN : The point I wish to make to the committee if I might that it would seem to me that sufficient unto itself in terms of the burden of defense under this bill would be to operate under the applicable state rules whatever they happen to be and I am not an expert on our rules and the law as far reaching as this not to unnecessarily or at least in a burdensome way incorporate

the federal rules and procedures, the federal court decisions and federal rules and regulations.

CHAIRMAN : Excuse me, Senator Gammage has a question.

FONDREN : Yes, sir.

GAMMAGE : Mr. Fondren, --trouble to point out to you at this time the references to federal trade commission interpretations that are included in this bill are included in the present law under the present _____ (inaudible due to cough in microphone and noise)

FONDREN : The concern is that in looking at the overall burdens imposed by the bill that we hope the committee would see fit to at least consider the possibility that our rules of procedure and our own statutes are sufficient under the _____ or certainly could be made to do so for those who attempt to practice under them. I do not have an amendment to offer with regard to the references of the federal rules. I simply wish to call attention to _____ and that you might consider some changes in that regard.

The second item of general interest to members of our association or my association that I represent do relate to the question of damages and of civil penalties in the bill. In particular as has already been mentioned the question of whether or not that in addition to actual damages and treble damages and court costs and attorney's fees that punitive damages on page 13 should be added. With regard to the question of civil penalties for those persons who are engaged in deliberate fraud or the unscrupulous in the marketplace you recognize that they are--they are not any damages that you can assess that would be sufficient. What you wish to do with those people of course is to put them out of business. I would suggest that since this bill applies to every retail establishment--(inaudible due to cough in microphone) _____ in the State of Texas. I see no limitation anywhere in the bill on this. That would apply too. That perhaps a penalty of \$2,000 for violation of \$10,000 could be extremely harsh on a person who is a legitimate business practitioner but who has come afowl of the law. Now, I realize that this may be heresy, but with a multitude of

burdensome rules and regulations from every level that any business operator is confronted with, that it is possible without setting out on a deliberate course of action to find yourself in trouble and in violation. I simply suggest that those penalties are very substantial and could well be excessive. I recognize that those are not minimum penalties that the court could of course in an injunctive case make the penalties much less, and you can say to me all right, they might ____ (?). I do think that it does indicate in connection with the damages, with the kind of penalties, and I mention that for example under the Truth In Lending Act, the penalty there for violation is \$100 per violation. Here we are talking about \$2,000 up to \$10,000 under the injunctive provisions. We are talking about \$10,000 per violation of an injunction up to \$50,000 for five violations. Those are very substantial and understand that we recognize that the authors of the bill and the Attorney General's Office is making a genuine and a real effort to get the unscrupulous out of the marketplace and this law will apply to everybody.

MEIER : What section are those monies in?

FONDREN : The damage section, Senator, is on page 13 under the Consumer Remedy part. The civil penalties which might be asked for by the Attorney General at the time of filing an injunction is on page 10 of the bill. By the way I do agree that under the present law where he can only bring injunctive action that perhaps it is not an adequate deterrent and that some penalties perhaps should be provided. I am simply calling your attention to the size of the penalties when you consider everyone who is covered by this legislation.

I think probably of most significance when you think of--

MEIER : Pardon me,--

FONDREN : Yes, sir.

MEIER : (Inaudible)

FONDREN : I thought that I had made that clear, Senator, that I recognize that that's not the minimum, but that is the ceiling on the bill. I recognize that.

CHAIRMAN : Senator Gammage.

GAMMAGE : It is discretionary. It is not mandatory as far as the national penalty is concerned, but in cases of particular aggravation where large sums of money may be involved as far as _____ is concerned. You don't believe that in some cases this might be _____.

FONDREN : Yes, I do as a matter of fact. As a matter of fact it might be inadequate.

GAMMAGE : But in cases of good faith and good will, bona fide error--(inaudible)

FONDREN : I don't know, Senator, whether they will or not. I would certainly hope not. I simply address myself to the problem that we recognize--the people who are covered by this bill and that is a very substantial penalty. For the unscrupulous fraudulent scheme, I don't think it is adequate in the first place in terms of being able to reach anything--in most cases those people are going to be judgment proof I am afraid and the burden is going to fall on the legitimate businessman who is stable and who is permanent and who is highly _____(?). That's the concern.

GAMMAGE : Is there already a large body of law _____ around--case law about whether punitive damages are appropriate? And this act right here is not going to just authorize the judges to start granting punitive damages. They are controlled by standards in the law already.

FONDREN : Well, my view, Senator, is that if there is a violation of this act that under--on page 13 under the Consumer Remedy Section that the court--is a new statute authorizing punitive damages on top of treble damages.

GAMMAGE : And doesn't the court already have a body of law to guide it in assessing punitive damages as well as penalties. In other words, the court is not going to assess large damages unless it is an aggravated case, or punitive damages unless it is an aggravated case.

FONDREN : We really don't have any precedent in Texas as far as I know in this consumer field at this time. I think that

in the same vein this is why I have been mentioning to the committee that in this bill for example there is no limit on the amount of recovery that might be awarded under the class action suit, no ceiling at all might be awarded. Now if the proper cure is to kill the patient, I suppose that is good, but I would suggest to the committee that consideration has been given in class action suits. Senator Proxmire as I recall had a bill in this regard with regard to class action in consumer matters, and as I recall he had a proposal--a dollar proposal of \$50,000 or ten percent of the net worth of the defendant--something that clearly would not kill the patient.

GAMMAGE (?) : You are a lawyer and you know that there is a writ of very important practical limitation and it is limited by actual damages. Have you ever tried to go into the courthouse and prove damages? That is a tough burden to meet.

FONDREN : But, Senator, you have a hundred people --in regard to class action now, you have a hundred people in class action at \$100 fee--let's say their damages are \$10 fees, but you add attorney's fees, you add court costs, you add treble damages and you add punitive damages and it will break a small business in a hurry with a hundred people.

GAMMAGE : Am I correct it is a class action on his actual damages?

FONDREN : Yes, there is no treble damage provision in the class action suit. That is strictly damages (?).

: I asked General Hill that very question. I said, either individual or class or both treble damages can be damages if you find it in the affirmative.

FONDREN : I might suggest that it is right here where he answered. Somebody tell us what page that's on?

: He gave me some misinformation.

FONDREN : Well, may I call your attention to the language unless it has been changed under paragraph B, item 3.

: On what page is this now?

FONDREN : On page 14 at the bottom of the page under class action. Now that may have been changed and we missed it somehow,

but that said punitive damages.

: Yeah, punitive damages but not treble damages.

FONDREN : It says court costs and attorney's fees in addition to actual damages under 1. Of course, under all Sections the court has the--is granted additional authority to make people _____ (inaudible due to cough), restore property and--

: Texas law though and this doesn't change the precedent that some injury, aggravation, some torts actually require no (?) recovery of punitive damages.

FONDREN : I disagree with you. I think a violation of the act permits punitive damages and I don't think there is anything in our law, Senator, that would change the fact that the court can grant it. I don't think that there is any limitation outside this statute.

: You don't seem concerned about this particular businessman being put out of business by--when he is bankrupt or due judgment. But if this man or individual or this business has affected that many people, and in fact swindled _____ and unscrupulously deprived that many people of that much money, I am not sure he shouldn't be put out of business.

FONDREN : Senator, I would agree with you but the laws unfortunately are not perfect in their application as you and I well know and I assure you that you have to assume that all of the irresponsibility and all of the unscrupulousness and all of the desire to achieve illgotten gains lies on the side of the businessman and none on the part of the consumer, and experience teaches us, Senator, that simply is not true. And I think that the reason that I am--

: But the businessman has his remedy as he used to (?).

FONDREN : Well, sir, I want to mention that in connection with the--this very thing--the amount of the damages. I recognize that an effort has been made to give some protection to the businessman. There is a provision if it is found by the court that a suit is brought for purposes of harrassment that he

is entitled to his attorney's fees. As General Hill stated though, there is no guarantee that he can recover those attorney's fees. There is no provision for bond or surety or any showing of financial responsibility on the part of the plaintiff, and the fact that he might be able to recover attorney's fees is a very small compensation.

: You point out yourself in here a moment ago that in many situations the business defendants also are going to be judgment proof.

FONDREN : Most of it is.

: That's a double-edge knife and you know, and all parties gamble on that particular--

FONDREN : As I pointed out, I think the unscrupulous businessman is more likely to be judgment proof or at least unavailable for judgment, but I do think that there is a great disparity of--reflected in the thrust of the bill in terms of the punitive expression on the one side and the very limited protection on the other. I recognize and applaud the effort to reduce the chances for harrassment. I simply would suggest to the committee that it perhaps is not adequate since there is no provision to insure any deposit or showing of financial responsibility in the _____ of an action of this type.

: Mr. Fondren, do you think it would be constitutional if we wrote some kind of bill that said a person had to be financially responsible before they had access to the courts in this state?

FONDREN : No, sir, I am not sure that that would be at all. I simply think to hang your hat on the back that you have all this protection for the defendant is not the recognized fact of life. I am not sure you can do anything about it, Senator, and as I said, I am not suggesting an amendment, but I do think that the committee needs to hopefully would be aware that that's a very inadequate limitation as written. Now whether it can be improved or not I don't know.

: I really think the answer to that problem is, Gene, is the court under the present rules of procedure can rule

either party for costs in advance and make you put up that kind of _____, the plaintiff or defendant either. And the courts do it all the time, and _____ protection that you'll-- if it is frivolous and harrassing that you recover your attorney's fees and costs under the present rules of procedure.

FONDREN : That clearly would be helpful.

ANDUJAR : What if the plaintiff _____ (?)?

: Then he gets his lawsuit dismissed. That's what happens if he doesn't--if the court rules the plaintiff for cost and he doesn't come up with it.

FONDREN : It is limited--he gets costs if it is not limited possible judgment.

GAMMAGE : It is limited in only the cost. He cannot recover his attorney's fees.

FONDREN : In the same regard, Mr. Chairman and members of the committee, I would mention this in passing and again I do not have an amendment to offer that under the other attempt and I recognize that as a sincere and bona fide attempt to offer some protection for the defendant under this bill. The Section 17.56 on page 21, requires the defendant to prove that the action complained of was a bona fide error. Now I am not suggesting what might could be done about that except to pinpoint out to you that this is a very substantial burden on the defendant and in effect he must prove himself innocent and is guilty until he does so in terms of this language in this statute. And that again assumes that he is going to undergo a substantial expense before he reaches that point in time. This is not a matter to suggest a great bleeding heart idea for the defendant so much as to point out to the committee that these expenses and these expenditures under a bill such as this are _____ (?) and paid for by all consumers. I think we kid ourselves if we don't recognize that all consumers pay for the expenditures made in compliance with all rules and regulations. They are a very necessary thing that we must have, but in drafting legislation I do hope the committee will keep in mind that the

consumer is going to pay.

I have two more items and I apologize for taking so much of your time that I want to mention to you. Number 1, two items dealing with the delegation of legislative power and let me state if I might to the committee that the remarks in this regard are certainly not personal. I have known General Hill a long time and I recognize that he meant what he said when he has a low threshold viewpoint about these matters. Certainly, it is not intended to reflect in any way on the personnel or the staff of any administration in office at this time, but this is very likely to be quite a permanent statute after many of us are no longer in the roles that we enjoy here today and I hope that we all continue this way for quite some time. But I would call to the committee's attention that under number 21 on page 5 of the list of specific deceptive practices, I have indicated to this committee that we approve of the delineation of setting out clarity and certainty what deceptive practices state are. There is granted by this bill an open end to extend this statute to broaden this statute by a rule-making power granted to the consumer protection division under Section 17.47, and again may I say to the committee that I recognize that to no legislator that this rule-making power has been drawn with great care and--

(End of Side 2 of Tape 1)

TESTIMONY ON S. B. 75 BEFORE THE SENATE COMMITTEE ON HUMAN RESOURCES
SENATOR BROOKS, CHAIRMAN
February 14, 1973

Tape 2, Side 1

FONDREN : --It is number 21 on page 5 and then on page 6 beginning with Section 17.47, sets out the rule-making procedure that the Consumer Protection Division may follow in adding deceptive practices to the statute, and the quarrel certainly is not with the manner in which rule-making power procedure is carried out. I point out to you that this is the delegation of authority to extend this legislation--to extend the statute by rule-making--making it _____desirable and this is clearly a matter of legislative determination.

CHAIRMAN : Senator Gammage.

GAMMAGE : Mr. Fondren, under a present law the following additions it is also _____(inaudible due to cough in microphone) the Insurance Commission of Texas, Motor Vehicle Commission, Board of Regents of the University of Texas system, Parks and Wildlife Department and the Alcoholic Beverage Commission, other states giving similar power to the Attorney General's Office--Massachusetts, Illinois, Idaho, Maine, Vermont, New Mexico, New Jersey and North Dakota and Iowa. So it is not unique.

FONDREN : Senator Gammage, I have not looked at all of those. One you mentioned, of course, it is an obvious one that I would look at--it is the Texas Motor Vehicle Commission. I would have to respectfully disagree with you sir that that kind of power is granted to the Texas Motor Vehicle Commission. Their rule-making power is this--the Commission after hearing shall make, amend, and enforce rules reasonably required to effectuate provisions of this act. I would respectfully suggest that, Senator Gammage, that rule-making power granted here goes far beyond carrying out the provisions of the act because in effect it allows new provisions new deceptive trade practices to be established by rule-making.

GAMMAGE : Not in the _____position where the amendment to be added a while ago. (Not clearly audible)

CHAIRMAN : Senator Clower.

CLOWER : On this originally 17.47 you will agree that these new rules hidden when they are made are not going to be

made in the dark someplace.

FONDREN : Yes, sir. I compliment the drafters of the bill on the draftsmanship in providing for the procedure, Senator.

CLOWER : It is going to afford notice on one (?). I would just like to make one additional comment about the Texas Motor Vehicle Commission. They have in addition to the power to make rules, they also contain a _____ provision in there if someone violates one of those rules that the Commission makes.

FONDREN : Yes, sir. I think the rule-making power of all of the agencies that I have looked at including looking at least one constitutional _____ this way. I simply have not found and I don't say this is not fair, but I simply in the short time of it, have not found one where this extension of power is granted. The Comptroller's Office for example who is another constitutional _____--his rule-making power is quite limited in comparison to the language contained in this bill in my opinion. The federal court recently limited or stated that the Federal Trade Commission did not have the power that it tried to exercise in this very area saying that it was attempting to exercise the power it did not have. Finally, in this regard assuming that other state agencies might have the power you've indicated, we suggest to those of you who are on the committee who are lawyers as I am, therefore, I feel like I can say this that we lawyers like to win cases, and the Attorney General of Texas is the lawyer for the state and he has powers to prosecute powers to initiate actions under this bill, and at some point in the distant future I think we should recognize that some lawyers might be sorely tempted to extend the rules and to write the rules that might be helpful to overturn a case that would change the outlook of a case. Again, let me assure you that that's is not a personal reflection, but I was simply recognizing that you are placing in one agency and in one body the power to write the rules, the substantive rules of determining

what is or is not a violation of this act, and then to prosecute and to initiate actions under the act. I think even more serious though, if I might hasten on, is the delegation of power of this act, legislative power to the courts of this state under the act. Under Section d, page 6, I thought--

CHAIRMAN : Mr. Fondren, excuse me, Senator Gammage wanted to make an observation on this last report.

GAMMAGE : I beg your pardon. I don't want to pick-nit on the agency power, but it has been pointed out by Senator Clower that the adequate motion provisions are required, that it is not done in a vacuum, that it is not done in the dark, that it is done to promote the proper enforcement of the intent of this legislation which is to clean up the marketplace of Texas, consumer and legitimate business operations. As far as the ability to set out and finance specific actions in violation of this proposed law, the University of Texas Board of Regents can define crimes under Section 51.202 of the Education Code. They can declare certain acts to be misdemeanors. I certainly don't approve of that for them.

: It might be _____ for them but--
(inaudible due to overlapping conversations)

GAMMAGE : I certainly don't approve of it.

CHAIRMAN : Mr. Fondren, go ahead.

FONDREN : I think of even greater concern is in terms of the application of the act is the provision on page 6, Section D, which in effect allows the court to legislate new deceptive trade practices. And the concern here is the practical effect of permitting this delegation or of authorizing this delegation of legislative power. Let me suggest to members of the committee that a person could bring a suit against me alleging that some practice that I was engaging in was a deceptive trade practice. They alleged it not because it was delineated to statute, not because the Attorney General had promulgated a rule or regulation saying it was _____ practice. It was simply alleging that it was deceptive. If I defend that suit and if I go to court and lose the case and the

final judgment is against me and the court of this statute says yes, that is a deceptive trade practice, and not only am I then subject to the consumer remedies in that case, but I then become subject under this bill to a class action suit on a what has now been ruled to be a deceptive trade practice by the court on a practice that at the time it was engaged in was not known to be a deceptive trade practice. That sort of delegation of power it seems to me is unjustified and I am _____ it and eliminates-- creates a great body of uncertainty. It has a great sledge-hammer effect on the inability or the ability of the defendant to take the chance to assert his rights. Because if he loses, no matter how small that case, then he becomes subject to a class action on a matter that was not heretofore known by anyone to be deceptive under the terms of this statute.

: Under 17.53, doesn't it cover that?

It limits a class action--any practice or type of act _____ is previously declared unlawful, deceptive, or unscionable, or--

FONDREN : I am sorry--go ahead--I don't have the full--go ahead and say the or that it is found to be--by the court?

: --the court would be the subject of the class action--in the middle of the page--beginning at page 14, Section 17.53--class action is available only as to an act or practice previously declared unlawful.

FONDREN : Yes, sir. After that previously means previous to the initial determination--to me, it reads that if a suit has been brought and the court has found it to be unlawful or a deceptive practice, that then the class action--I mean that's previous to the class action. Perhaps, I am wrong, Senator, but I think to me if the court finds it to be unlawful or deceptive, that is a previous finding and a class action can be brought.

: Well, the way I would read that would say that a class action would only be available in the case where something had been declared to be an unlawful act, either by the statute of the court prior to the time that party engaged in it.

FONDREN : I hope that is what it means. I would hope the committee would clarify it to be sure that it means that. I

think you can see the tremendously onus burden that a defendant is placed under in going ahead and asserting his rights defending himself when he is confronted with--if he loses with that very serious possibility.

CHAIRMAN : Senator.

: The language is pretty clear here. It speaks to judgment of the appellate court of the proper jurisdiction and being in this state that has been recorded--it says--you know, it is on the record. And aside from the language set out in this bill--it might already--go ahead and point out that there is currently a sales case here in the Civil Appeals Court in Austin, the Westward Case (?). The Court of Civil Appeals said that it had that authority.

FONDREN : What authority, Senator?

: To declare this a deceptive trade practice.

FONDREN : All right. Well, if I might add one other thing--

: I think as a practical matter also. There is a two year statute of limitations here and as a practical matter that kind of lawsuit to be filed to be litigated, to be appealed gotten up to the Supreme Court for a final determination, your two years will have already run.

FONDREN : My interpretation would be, Senator,--you are a much better lawyer than I am--but my interpretation would be that until the court found it to be a deceptive trade practice, the statute could not run. It would not run because there would be no motive to pray--it was not such a practice until the court found it to be so.

: But the applicant (?) is taking place before it originated (?)--is what I am saying.

FONDREN : I am frankly fearful that that would not be adequate protection, that there is a grave doubt here that you would not be subjected to a class action _____. You may be perhaps right, Senator. It seems to me that that's a matter that the committee needs to carefully look into.

One final comment, Mr. Chairman and members of the Committee, if I might make it, would be with regard to the

section on class action. Again, the drafters of this legislation ought to be highly complimented on delineating and limiting the circumstances under which a class action can be brought in connection with this bill. They have done a most careful and expert job of draftmanship on the class action section. My purpose in mentioning this is to suggest to the committee simply for your consideration whether or not a class action, a statutory class action, is appropriate in these consumer matters? Simply because I am old-fashioned enough to wonder whether or not, or to at least believe that whenever the power and facilities of government, in this case the State of Texas, are to be applied to resolve a private controversy and a private dispute that great caution and great care needs to be exercised. I simply would like to propound the committee a couple of questions in this regard and that is whether or not a good consumer purpose is served by providing for class action. And, of course, only you and the legislature can answer the question. Number 1 I would ask whether or not a class action provision is needed to compensate consumer--a consumer or consumers for an injury sustained in this bill, or under the terms of this bill. I simply suggest to you that under the bill without the class action the consumer can obtain damages, treble damages, punitive damages, attorney's fees, court costs, and other relief that may be described by the court, including restoration of property and the establishment of a receivership to insure the protection of his rights and the securing of a collection of a judgment. In view of that I propound the committee whether or not a class action is needed to protect or to provide compensation for the injury that might be suffered as a result of a violation of the act. Secondly, the question it seems to me about class action is whether or not it is needed to prevent the retention of ill-gotten gains. And I think that there are cases in which this clearly is the case. I think the anti-trust cases, I think that the deliberate fraudulent scheme cases where stock frauds and things of that type are perpetrated, almost demand a class action. But I would suggest that there recovery is unlikely in any event. And in fact the

provisions of this class action section are more likely to be _____ or applied in nearly every case to the legitimate business person with very harsh economic consequences. And would simply point out in closing to the committee that the trend seems to be in consumer matters and in particular in Truth In Lending matters to be by the courts, and a number of states to be waived on the committee is the plaintiff's class action.

Let me say to you that if this committee and if this legislature decides on class action that the people who have drawn this section of the bill have done a most excellent job. And if you are going to adopt one, I would commend this one to you, but I simply want to point out the possible consequences and also to point out that this is in the face of what the courts have found in handling class actions in consumer areas and particularly to the limit.

In the Ratner Case in New York the court said this: "The allowance of thousands of minimum recoveries to like plaintiffs carried to an absurd and stark finding extreme is specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement. Proposed recovery of \$100 each to some 130,000 class members would be a horrendous, possibly annihilating punishment unrelated to any damage to the purported class or to any benefit to the defendant of what is at best a technical and debatable violation of the Truth In Lending Act." This obviously is a case which does apply to the legitimate business person who finds himself charged with a violation or in violation of rules and regulations and statutory enactments. In the Shield Case -- "At a time when large business firms in general appear to be a scapegoat to a great many of our nation's problems, the courts should not gratuitously add the final straw. The Truth In Lending Act has laudable purposes, just as I submit this act had laudable purposes, many which we endorse, and should be strictly enforced by the courts, but it should not be allowed to be used as a means of oppression or harrassment or unjust enrichment. An interpretation of the Act to allow actions such as sought by Mr. Shields could be the means of curing an illness by killing the patient, and in the process promoting unnecessary litigation

mainly for the benefit of a few lawyers ready and willing to promote such cases."--quoting from the court in that case.

I appreciate very much your attention, lady and gentlemen. Thank you for the opportunity to appear. I will be glad to try to answer any questions.

CHAIRMAN : (Inaudible) If there are no other questions, thank you very much, Mr. Fondren. We will now call Will Davis.

PATMAN : Let me ask the author something, if I may.

CHAIRMAN : Senator Patman.

PATMAN : The term misleading or deceptive actual practices included was not limited to the _____--passing off goods or services as those of another--what do you mean by that. I really--

: This is in the current Consumer Protection Bill.

ANDUJAR : (Inaudible) --an example or something.

PATMAN : Is that going to be clear to people who read that?

ANDUJAR : It would be obvious to the people selling cars saying that they were Chevrolets when in fact they are not?

PATMAN : Well, couldn't we clarify that a little bit?

: It is a _____, Senator, that comes out of the _____ Trade Practices Act which has been adopted by almost 50 states and a big _____ of them all are behind it interpreting that phrase.

PATMAN : Well, does it seem crystal clear to you?
: Well, not on its face--(inaudible due to overlapping voices).

DAVIS : Senator Brooks, I wonder if the committee would not mind if Mr. Robert Snead might precede me. I will follow him immediately. We have kind of rehearsed this and we think we can save your time if we will take it that way.

CHAIRMAN : I will be glad to. The Chair now calls

Mr. Robert C. Snead (the dynamic lawyer) (laughter)

SNEAD : Mr. Chairman and members of the committee, my name is Robert Snead and I am representing the Texas Association of Life Insurance Officials. This is the trade organization of the very small life companies in Texas _____ associations and many of them are mutual companies in nature. At the outset let me say that I would like to limit my remarks to the one area, the area of seeking the inclusion within Senate Bill 75 of the same language or the exemption of whatever you would like to call it that now exists under Article 50.69-1003. Each one of the exemptions dealing with the present law have been brought forward into Senate Bill 75 except the business of insurance, and I feel that when any industry or any person appears and says, let me out, that they have the absolute duty and burden to establish the justification of that.

Will and I discussed it ahead of time to try to deal with it, divide up the points so that we would not be duplicators or take up more of your time than was necessary. But we do feel that the discussion, the background and the justification should be made and should be made plain and clear.

First of all, I think it is a question of what is insurance? What's the problems of insurance? Where does it exist? Why doesn't the public like it? It is a necessity. Something we all buy. We all pay premiums for. And generally we get mad every time we pay the premium and the question is why and how and what is it?

Fundamentally, it is a deal that is made between two individuals. It is a piece of paper that says, you pay me now or periodically and in turn happening or based upon the happening of the contingency, we will do something for you in the future. And this is the most difficult, troublesome area of all the portions of the world of commerce because it is the taking of the money now and promising to do something in the future. And this has been dealt with time, after time in trying to come up with the solution of the regulation and the dealing of these particular problems.

Now, insurance today is in my opinion, and if I may say so, totally regulated. It is regulated by an agency, an arm of the state which exercises both a legislative and judicial

function. The bill you have before you likewise exercises or proposes and authorizes the Attorney General to exercise legislative and judicial functions. The rule-making powers the determination of what is or is not involved or a violation the deceptive practice or what have you is a legislative function. The interpretation, the meaning, the finding of fact, and in effect the conclusions of law as to whether or not this is a bad trade practice or deceptive or false advertising is a judicial function determined by that commission. Now at this time the legislation or the Insurance Department exercises these two functions. Now the reason I am bringing it out in the very beginning is that the amendment which Senator Gammage offered says and in effect and deals with an attempt to say there can be no conflict in the legislative function, that is, in the prescribing of rules, but it does not deal with the conflict in the judicial function, the making of the findings of fact and conclusions of law.

(?) : Mr. Sneed, aren't you subject to dual regulation in that respect already?

SNEAD : By whom, sir?

: By the courts of this state. Insurance companies are--

SNEAD : No, sir. It is the determination of the practice, the finding of the fact. You see at this time, Commissioner Cotton here can, if he wants to and believes that he has the justification for it to write one piece of paper and sign his name and send in his staff to take over any insurance company in this state like that.

: Do you think that any of this allows the Attorney General to do anything in conflict to that?

SNEAD : What it does is, it will allow the State Board of Insurance to make a determination of a fact this is or this is not false advertising, and it allows on the other hand, the Attorney General to make the same determination. As I was discussing with my neighbor down town about it and we were talking about it and I said, it is like this. You and I have a lawsuit and we tried it in the 53rd District Court here and you get a jury verdict there, and

then we tried the 98th District Court and I get a jury verdict. Who wins? In other words, the Commissioner or the State Board of Insurance can make a finding of fact and law; the Attorney General make the other, and we are in the courthouse.

: Well, I think bill recorded that, doesn't it (?)?

SNEAD : Rule-making. It does not, and the amendment to the--the point I was making and I will say it again. The amendment that was offered deals only with the elimination of conflict in the area of the legislative function, rule-making.

: What fact finding is it that would give you a problem?

SNEAD : Well, we give you an example, and this is in the health insurance field--there are three classes of policies. The permanentable at the option of the company, the guaranteed renewable and non-cancelable. Now for many years in the state, the advertising was, this is a non-cancelable policy. The normal individual understanding of that is simply this. If it is non-cancelable, the company can't cancel it. Now that is not what it means at all in the rules and regulations of the State Board of Insurance. It is one that cannot be changed under any--you cannot adjust the rate. Now, if you have the right to adjust the rate, then you can only advertise it as guaranteed renewal. Now these are words of art, not the normal common law meaning, but are words of art that are specified. They have a specific meaning. For example,--

: Well, what you are saying is that the Attorney General might look at it as a _____ (inaudible due to overlapping conversation)--meaning--

SNEAD : He might say it means this. The Board say it means this, and the companies are functioning under this regulation and the State Board of Insurance is functioning, interpreting on a national basis as is, passed on through the NAIC which is the National Association of Insurance Commissioners, and you get one specified meaning and then you get the Attorney General taking a different one, and the company gets then caught in between.

: Well, aren't you subject to the same

problem presently in the current law because some person out there feels aggrieved by this case still going to court now? (?)

SNEAD : They certainly can, but you see the placing of it at this time puts two governmental agencies taking affirmative action. It is a whole lot different to be sued in the courthouse by an individual than it is by the Attorney General. Now, and, in addition to this, the Attorney General is the attorney for the Board. If there is a proceeding, a _____ proceeding to take that company's charter away, stop it from doing business, close it up, put it in receivership, all these things, he is the attorney for the Board. Now suppose they had a bill differently. What we are basically saying is that we don't seek to duck, dodge, or run away, but we have here a very detailed basis of this regulation. If I may go into the history of it--

GAMMAGE : Excuse me, again. Mr. Sneed, one question. In other states in the other jurisdictions that do have this rule-making power and do have this judicial authority will determine that vested in the Attorney General's Office and in other agencies, are you aware of any conflict where these words of art or any other kind conflict like this has arisen?

SNEAD : From the discussions I have had with the various people that are within the industry, always it deals in the area with the insurance governing body, the Insurance Department or the Commissioner, or whatever it be in the various states, the one where the paramount controlling jurisdiction is vested.

GAMMAGE : Well, don't you think that even in this situation, even in this bill, that the Attorney General would feel bound by it? Certainly, the courts would hold him bound by the traditional words of art in terms of the trade?

SNEAD : Senator Gammage, you know I grew up with John Hill in effect--General Hill, I apologize--and I have got great faith and confidence in him, but I do not know--(inaudible due to overlapping conversations).

: _____(inaudible)--talking about whoever _____.

SNEAD : No, sir, I think that we are drawing the

distinction here of government by men or government by law. We feel, and we would urge this Senate to regulate, put it on but put it in one spot. Like General Hill said, the public is entitled to know where it goes--I don't want to misquote him here, but he said, they are entitled to know where the agency is, and the public now knows where that agency is.

GAMMAGE : The problem here though is what remedies do the consumers have under that agency right now?

SNEAD : To the best of my ability, Senator, to examine and compare them all, and, let me say this, some of the state regulations goes beyond this bill. For example, as I read this bill, it does not deal with the interstate advertising and solicitation in this state. Now, this State Board of Insurance and the people I worked for came in and I lobbied on the bill, and in 1967 immediately following the denial of the writ of certiorari in the Minister's Case (?) out of upholding the Wisconsin statute, which is in effect a long arm statute, we came in and went before this legislature and there is even regulation of non-admitted carriers in this state by the State Board of Insurance.

Now I was down at our little place in the country. The neighbor gave me a solicitation. It came from out-of-state, and he said--he runs a ranch down there--and he said, this looks pretty good. He said, "For fifteen dollars I can get all this basket of treasures, and a \$250 vacation because they said my name came up on a computer, and of course, it was a printed deal. And he said, "What should we do?" "We would like to go to Florida." Now, Mr. Manford and Mr.--I told him not to do it--(Laughter)--but now that sort of thing in the field of insurance is regulated because of the statute. Now, I don't believe this bill goes that far because it does not include the provisions that Mr. Manford worked so long on putting that in. Now all we are urging you is to put us someplace, put the authority there--if we are bad, close us up and give us a penalty. Now, as the law now exists, we think that exists, and there are only three differences that I can find, and I may ____, between Senate Bill 75 and what is the combined authority of the State Board of Insurance and that is in this area--one, there is not the

treble damages. Two, there is not the authority for the Attorney General to bring a class action suit or the City Attorney or the District Attorney. And last, our fines aren't as large. Now there may be that I have missed some of this.

: You missed attorney's fees.

SNEAD : No, sir, it is already in the statute. In other words, on any life, health, or accident policy that my people don't pay and you file a suit against them for--we say that--

: Deceptive practices?

SNEAD : It would lie in the area of a class action suit brought by a series of policyholders against the company.

: Wouldn't it have to be a common law action of fraud though?

SNEAD : I don't think it's misrepresentation. Any of the grounds for a class action suit is now exists, and I am certainly no expert, but any ground that you can now bring a class action suit. These standards in here pretty well follow the standard within the federal law as I understand them. So what you are bringing in is that specifically and you are setting it up and you are giving to the Attorney General the right to bring this action.

: You are giving a private right of action.

SNEAD : A private right already exists.

: That's the problem. That is one of the reasons why we have got this bill now is because the private right of action does not exist.

SNEAD : For a--well, let me say this--there have been some filed, and it has been settled. And I do not read--you are referring to this Supreme Court opinion and _____ (?) Case --I do not construe it to mean that you cannot bring a class action suit. I think that we can.

: (Inaudible)

SNEAD : The practical effect of that case was and I think the guidelines laid down to the court are very similar--to exactly what the guidelines are that you have here. I think that the main issue is duplicity of regulation. You see, you can't really pass upon a policy of insurance as to whether its advertising is or is not false without having in many instances an actuary, an accountant, an examination of the company, and as it exists right now--and I have here, let me pass these out and just completely out of order. These are the latest rules and regulations of the State Board of Insurance and guidelines established by the Commissioner dealing with--each company has to keep for three years every piece of advertising as to exactly the _____ exactly what they put out in advertising. Now, as far as I urge my clients, I urge that they never issue a piece of advertising until they have come down here to the State Board of Insurance and submit it, and even then when they get through, you've got the Deputy Commissioner, Mr. Don Odum, and when he goes over it you have got a whole department over there to review all advertising and he won't even permanently approve it. He says, "At this time, we have no objection." And if anything then develops, he immediately withdraws it. You see--

: Let's get back to this problem--this right of action--(inaudible due to cough in microphone). Isn't it a fact that under that statute that you mentioned where you are entitled to attorney's fees. That's limited strictly to wrongful--

SNEAD : You've got a claim, but--
: --wrongful failure to pay a claim. Isn't that right?

SNEAD : That is correct.
: It doesn't have anything to do with deceptive trade practices, does it?

SNEAD : Well, deceptive trade practices you are speaking of now, Senator, in relation to a class action suit.

: I am talking about just one single individual wants to file a common law action for fraud against an insurance company based upon their advertising. He is not entitled to get attorney's fees, is he?

SNEAD : I would say that is correct. You are talking about a single individual filing suit. Now do you--

: --in many cases there is recovered mainly attorney's fees--(inaudible due to overlapping conversations)

SNEAD : Let me point out the difference now between what is the regulation--the regulation of insurance and the normal business. You see an insurance company pays a premium tax, and that premium tax in part goes for the state to hire attorneys to look after these people, to set up the examiners and do everything that's legal. Now the first thing that occurs if that is false advertising is it goes to the Commissioner and the first thing they do over there is if there is no fact question--and if it is false, just like General Hill was saying, if it's bad, they are going to say, we are going to put you out of business, or we are going to get all of that straightened out and there is not the necessity for an attorney because the state is already furnishing attorneys to handle it. And the _____ to enforce it.

: And the individual involved gets compensation.

SNEAD : He would go to the Insurance Department.
: And the company would give him his money back?

SNEAD : And the company--when he said, you are either going to do--you are either going to get satisfied with the public and take care of them, or I am going to put you out of business. Now, the penal--the penal provision, the penalty--the penalty is that you have the authority, and where the greater strength is in the

Insurance Department if there is an offense. If something is wrong, the Commissioner can by one signing of his name take away that authority to do business. By the signing of his name he can take over that company and run it. He has a whole staff set up over there for one purpose--the liquidation division, and any time an insurance company is insolvent or in conservatorship or what have you, he takes it over and runs it.

: Well, we are not talking about controlling the insurance companies here. All we are talking about is deceptive trade practices.

SNEAD : Well, no one--Senator, what your interest in is, is to protect the man, the public. So if he had been defrauded, he gets his money back. Now if it is the ABC Sewing Machine Company, there is nobody that--regulating his business that can close him up, that can take him over and take away his right to do business. He can continue to keep on doing business. When this man over here says, you are going to stop, and you are going to take care of these people, then you pay the money back. So what you have is, if you are saying here--the distinction is here---you are saying that this man doesn't have an attorney to represent him, so pay that attorney to do it. What is happening in the process of regulation is that the state through the tax on the insurance company is furnishing an attorney and an _____ to represent the public to make that take place.

: Mr. Chairman, I wonder if we could recess for an hour?

CHAIRMAN : Senator Patman suggests that we might want to recess here. We do have four witnesses to be heard.

: How many witnesses do we have, Mr. Chairman?

CHAIRMAN : We have three more witnesses to be heard. Mr. Davis and Mr. Winters and Mr. Tigner. Mr. Davis has indicated that he probably would not take much time, but there are three here.

PATMAN : It will take us quite a while to vote on this--

: Let me ask this--in view of the magnitude of the testimony, both of Mr. Fondren and Mr. Snead and the offer of some amendments, what about--can we continue this tomorrow? What is the pleasure of the Chair in scheduling it tomorrow?

CHAIRMAN : I really, gentlemen, would like a little bit of a response from the committee because I think it might be very wise to set it tomorrow, and then the people who have not had an opportunity to be heard--two of the people who are to testify are from Austin and I don't think tomorrow would be too bad an imposition on them. Mr. Davis and Mr. Winters, could you come tomorrow?

DAVIS & WINTERS : Oh, yes.

CHAIRMAN : How about Mr. Tigner?

TIGNER : I will comply to your wishes.

CHAIRMAN : Well, we don't want to inconvenience you. Well, you could stand another day in Austin? (Laughter)

TIGNER : I will be glad to--
: Senator Brooks, are there any schedules in the morning?

CHAIRMAN : Yes. Finance has _____ in the morning and then there is also a _____(?).

: What time does it go in?

CHAIRMAN : Ten thirty.

: Education won't meet in the morning.

: We can finish up tonight, Mr. Chairman.

CHAIRMAN : I will do whatever the committee would like to do.

: I will too.

: Let me just put it in the form of a motion. We agree to meet at 9 o'clock in the morning.

: Well, let's make it 45.

HARRIS : I move that we recess until 9 in the morning.

PATMAN : I have a substitute in the morning that we recess for 45 minutes.

: --okay, come back about 7:15.

: Yes, that would be all right.

CHAIRMAN : Senator Harris moves that the Committee stand recess until 9 a.m. tomorrow morning, and Senator Patman makes a substitute motion that the Committee stand recess until 7:15 this evening. A shorter time comes first, so we vote on Senator Patman's motion to come back at 7:15 this evening. We like a show of hands. All in favor of coming back at 7:15--recess until 7:15. All against. (Laughter)

: All the law partners vote together there.

CHAIRMAN : We will stand recess until 7:15.

AFTER RECESS:

CHAIRMAN : Mr. Snead.

SNEAD : Mr. Chairman, if I may get--go back to where I started to in the beginning.

PATMAN : Let me ask you. May I ask a question?

SNEAD : Yes, sir.

PATMAN : In those regulations where it said in health and accident insurance policies that you had guaranteed renewable where you could raise the rates, and what was the other term?

SNEAD : Non-cancelable, or--

PATMAN : Non-cancelable which does not raise the rates?

SNEAD : Right, sir.

PATMAN : When were those regulations adopted?

SNEAD : They had been--the particular ones that I have passed out were adopted at the end of 1971. There have been other regulatory rules and regulations used by the Board and then there have been some just "bootstraps" (?) saying I don't care what, you know, this just is bad and you are going to stop it.

PATMAN : Well, I am glad to hear that because we hear a lot of complaints about the health and accident field. I don't know-- (inaudible due to overlapping conversations) --carried

by those regulations--

SNEAD : And this is what I will get into--the evolution of how this thing has developed and how the regulations have taken place.

Let me go back to the beginning of this.

PATMAN : Well, I don't want to detract from your testimony about this bill.

SNEAD : The original act was 2121 which was the discriminatory statute. That is, you treat everybody alike and you do not misrepresent and that sort of thing. Originally developed from the New York law out of what was called the Armstrong Investigation then was adopted initially in the State of Texas in 1909, following exactly the New York law, and everything rocked along so far as regulation was concerned until in the 1940s. At that point, and let me say this, the relevancy of all this is the reference in this particular act of the Federal Trade Commission, and what we will do is to show this evolution to you of the status of the law and tie back into the Federal Trade Commission which this bill said if you comply with the Federal Trade Commission, then you have no problem. Now up until the early 1940s insurance was deemed to be intrastate commerce and subject to the regulation of the state. In the early 1940s, I believe '43 or '44, the United States Supreme Court in the Southeast Underwriter's Case held that insurance was a matter of interstate commerce and subject to the regulation of the Federal Government and that the states do not have authority to regulate.

PATMAN : Let me ask a question. Do these other states that have consumer protection acts-- do they purport to regulate insurance matters too?

SNEAD : And all I have gone at is an attempt--

PATMAN : Do they exclude--

SNEAD : --to find, and I have not tried to check state--

PATMAN : Do you know of any that exclude--

SNEAD : -- in a model act as I understand a model act as proposed. It exempted--

PATMAN : What is a model act? I don't even know what that is said is true.

SNEAD : --what I think--what I hope to be and I do not represent this to be--but this is what I have been informed to be--

PATMAN : You mean the model consumer protection act?

SNEAD : Yes, sir, the model consumer protection act.

PATMAN : Well, my question though--do you know of any state that exempts insurance from its provisions?

SNEAD : Not specifically to answer you.

PATMAN : That's all.

SNEAD : I do say that the model act exempts, and may I read it--"Actions or transactions permitted under laws administered by the state public service commission or other regulatory body or officer acting under statutory authority of this state or the United States for the state fair trade law," which is my understanding of what is the model act and then it also exempts the matter of _____. Now this act goes to the question of the Federal Trade Commission. It exempts the Federal Trade Commission regulation and what I want to demonstrate to the committee is how this relates to the State of Texas. Now when the Southeast Underwriter Case was decided by the Supreme Court of the United States, it said that insurance was interstate commerce and solely regulated by the federal government and at that point there was no federal regulation. It was a complete break and Public Law 15 was then adopted by Congress and I think unanimously by Congress which said that the several states are granted the right to regulate is the matter of insurance to set taxes, anti-trust laws and all matter of regulation, and at that point the National Association of Insurance Commissioners--

PATMAN : Pardon me, but what year was that?

SNEAD : That was in, I believe, 1944 that the Public Law 15 was adopted by Congress immediately in or right at the end of World War II. The NAIC, the National Association of Insurance

Commissioners then came in with model laws urging each of the states to adopt these model laws and regulations. And at the end of that and as a result of that in 1951 the State of Texas adopted what is now Article 2121 of the Insurance Code which deals with the matter of advertising, fair trade practices, and all that goes with it. And then, as inevitably follows, there was litigation between the Federal Trade Commission saying, no, the states didn't have that authority in the matter of advertising and so in 1957 in the American Hospital of the Life Insurance Case v. Federal Trade Commission in the 5th Circuit opinion by that court, that court found as a matter of fact--and may I read from here the next to the last concluding paragraph-- "The commissioner examiner found that each of the states in which the petitioners did business except Mississippi had enacted laws for the regulation of false and deceptive advertising." Mississippi enacted such a law while the matter was pending before the commission. This is not controverted.

PATMAN : What is the date of that suit?

SNEAD : The date of that decision was April 9, 1957.

PATMAN : All right, when did the Commission adopt these regulations that you and I are talking about on accident and health here?

SNEAD : You are talking about the last ones or the ones in between.

PATMAN : The last ones.

SNEAD : The last ones which were brought on up to date which are stronger--

PATMAN : And they are the most meaningful of all, aren't they?

SNEAD : They are the most meaningful and they are stronger than the rules and regulations of the Federal Trade Commission in my opinion.

PATMAN : In 1971.

SNEAD : They were adopted in 1971.

PATMAN : From 1957 to 1971--

SNEAD : There were various and sundry rules and regulations that were adopted.

PATMAN : And that's why we had all those complaints, I guess.

SNEAD : And then from that and the evolution which is followed in 1971 you have the regulations before you which are now the ones that are enforced. You have set up a separate department.

Now the bill before you -- the bill before you says there is an exemption if you go with the Federal Trade Commission. In other words, this is a compliance with the provisions of this act if you are with the Federal Trade Commission.

PATMAN : Where is this exemption in here now? You are talking about on 75?

SNEAD : Yes, sir. And that is was General Hill's testimony to that effect.

PATMAN : Okay. I didn't hear all of that.

: But what you are saying is that this bill is designed not to conflict with the Federal Trade Commission or any other state agency?

SNEAD : And what I am saying is that in the State of Texas, the federal government by Public Law 15 as supported by the finding of the Fifth Circuit with writ of certiorari denied by the United States Supreme Court, it is said that Texas does regulate that Texas does have the authority to do it. Now, if a domestic company in its advertising practices if a matter goes before the Federal Trade Commission, it is then sent by the Federal Trade Commission to the State Board of Insurance, and there is in effect commonalty or cooperation between the two and they go back and forth. So what you have is, the State Board of Insurance in this evolution of the process between will the federal government control the decision by Congress that the states will control. You have ceded bound to the State of Texas the same regulation as the Federal Trade Commission so far as the Insurance Department is

concerned. Now we say and we recognize in this bill the Federal Trade Commission. We are saying that the State Board of Insurance is now regulated, is now doing more than is being done by the Federal Trade Commission in the overall field of insurance regulation. This is the body and the authority that is vested. So what we have is tying it together. We have the expertise. We have the examiners that go out and check. We have the fieldmen who go out on every single complaint to find out what the public is saying. We have a bunch of actuaries. Now I frequently can't understand and I will admit what they are saying, but these are the mathematicians at the Department. And you put it all together and you have the regulation. Now the effect of this bill is that if you are going to make in the Attorney General's Office the same determination, come up with the same, this is an executive body, both the Attorney General and the State Board of Insurance, and when it makes fact findings, it is doing so in a judicial capacity. When it adopts rules, it is an executive body exercising a legislative function. Now, by the amendment of Senator Gammage, you have attempted to tie together here saying that it cannot--the Attorney General in his legislative function cannot come in and say, we legislate contrary to what the State Board of Insurance does, but the fact finding or the judicial function you have not tied together. We--

PATMAN : Let me ask a question at that point if I may. Doesn't that just afford the public a double layer of protection?

SNEAD : No, sir, I don't think so.

PATMAN : I mean it affords him another opportunity for _____ (inaudible).

SNEAD : But, Senator, that is not the point that General Hill said.

PATMAN : Well, I don't know whether it is what he said, but doesn't it do that?

SNEAD : No, sir, I do not think so because it does

not afford to the public a double layer of protection when there is the possibility of conflict between the two.

PATMAN : Well the only conflict would be resolved in favor of the person that's protected, isn't that right?

SNEAD : Well, let me say this.

PATMAN : His warranty would be stronger than the other?

SNEAD : Let me go back to the example I gave earlier that I argued with Mr. Doggett. Let's assume you and I have a lawsuit. We go up to the courthouse and try it. We try it in the 53rd District Court and you win the jury verdict. We try it in the 98th a jury verdict and I win. Now who gets the judgment? Now this is what we are up against. Regulate us? Yes. You know, if we sin, then the way of the transgressor ought to be hard, but somewhere there ought to be the representative of the state, the body, politic, that is regulating the industry, not the joint. Now this is fine-- as I pointed out in what I believed to be the model act. It exempted other state agencies. What you are getting at here, the thrust, the consumer protection, as was testified to during the special sessions by the Dean of--the former Dean, Mr. Kimble, Preston Kimble, of the Wisconsin Law School, the thrust of consumer is to get to what is paid by the individual-- that it is a proper rate or a proper price and that he gets what is represented to him that he gets. And that's what we want. And that's what you want. Now the--

PATMAN : Is there anything in this bill that accomplishes that?

SNEAD : Yes, sir, to the extent of this--that it divests double jurisdiction, the very thing that General Hill said he wanted in the bill, that he did not want any conflict between the state and the federal government and therefore he said we follow the Federal Trade Commission. Now, so far as insurance regulation in the State of Texas is concerned by reason of Public Law 15 acceding to the states the State Board of Insurance performs the function of the Federal Trade Commission. It regulates and, as I say, in my opinion, it is more stringent regulation as of the last adopted rules than

is the Federal Trade Commission. So all we are saying it --tie it together, put us under somebody, but let us know where to go, what to do and how to do it so that we are not caught between the two. If you want to put us in the State Board of Insurance and say, let the Commissioner make the determination, or the Board; if there is fraud that there is a refund of the premium, or whatever, the procedure before the administrative body is far swifter, and far better than it is to the courthouse.

PATMAN : Let me ask you this. Are insurance companies subject to FCC?

SNEAD : Yes, sir. Wherever they are within the issuance of a public--now, by mutual assessment they are not subject to it.

PATMAN : Well, that's what happened under the National Bankers Life.

SNEAD : I am not too familiar with it. I understand that's what was done was.

PATMAN : And you are subject to a county attorney's _____ of action against you for some sort of fraud, I suppose?

SNEAD : Yes, sir. But you see in the FCC it is a matter of National Bankers in the sale of stock. It was not a determination. It was out (?) of the determination that was made by the State Securities Board and then reversed by the FCC.

PATMAN : But that was the FCC and the FTC. They were both possibly involved or could have been.

SNEAD : I am not conversing with you. I do not know of --

PATMAN : You are not subject to this one regulatory agency at this time, are you?

SNEAD : Yes, sir.

PATMAN : You mean the federal government has nothing to do with these practices?

SNEAD : So far as income tax returns, they are concerned. But so far as advertising--

PATMAN : What about the FCC?

SNEAD : No, sir, because if there is no one in

the people that I represent that are engaged in the sale of stock in interstate commerce.

PATMAN : How about the Federal Trade Commission?

SNEAD : No, sir, which causes the fact that under Public Law 15, the federal government, the Congress of the United States, has ceded to the State of Texas the right to regulate the advertisement of insurance companies and has ceded it to the State Board of Insurance as the entire development of the court from 1909 through the latest rules adopted in 1971--the course of the history of the industry, has placed the regulation of the insurance industry in total scope into the State Board of Insurance. Now we don't object if we need to give to the State Board of Insurance the power itself to _____ administration. You don't do it. (?)

PATMAN : Well, in a nutshell, you are opposed to the bill because it adds another _____ of regulation.

SNEAD : I am opposed to the bill from the standpoint that there is a hiatus.

PATMAN : A hiatus?

SNEAD : A hiatus of regulation. You have got dual regulation--

PATMAN : Well, that's not a hiatus, is it?

SNEAD : --and the thrust of the consumer--

PATMAN : A hiatus is a "gap", isn't it?

SNEAD : Well, which one would control? The basic thing is if it is fundamental and again, General Hill said what the consumer approach is--tie it down into one area, one control where the public knows what to do, and that is exactly what he was arguing and the thrust and the purpose of this bill was to tie it down to one place. Now, I dare say that he will probably get some insurance complaints, but the public today, I'll bet you that 99 percent of all of the complaints that come in on the matter of insurance into the state agency go to the State Board of Insurance because that is where they look to. And it is this--

PATMAN : A lot of them come to my office.

SNEAD : Yes, sir. I understand that.

CLOWER (?) : You will agree that we can all send them to

the Attorney General in effect?

CHAIRMAN : Senator Gammage has question.

GAMMAGE : Mr. Snead, you know, we have gotten off into the internal (?) imaginations of the insurance industry and all sorts of policy questions and what have you. Then the point of fact, this act, this bill deals with deceptive trade practices primarily in the enforcement area. If we want to talk about the dual rule-making, we can get off into that, but we have already avoided conflicts there, but primarily in the enforcement area-- it does not deal with all these internal workings and internal machinery of the industry. Under your proposition of prohibition that we followed--precedents that you want to set here--prohibition on overlapping functions, or any kind of a dual function here would exempt all sorts of industry, wouldn't it?

SNEAD : No, sir. No. sir.

GAMMAGE : What about the Comptroller, the _____
_____ (inaudible due to overlapping conversations)

SNEAD : You are changing the precedent. You are making the judgment to change the precedent. The precedent is now with the State Board of Insurance. That's what the law says now. You are taking and moving the State Board of--the insurance regulations from this particular provision--

GAMMAGE : We are not removing it.

SNEAD : You are changing families (?). You are taking the provision of the regulation now and you are the one that--or the bill that is before us is what amends the law.

GAMMAGE : I agree--

SNEAD : The law says now--

GAMMAGE : I am talking about the exemption here that you are trying to include under this act and under this new act, not all presently on the books, but under this bill right here.

SNEAD : But, Senator, your question related to what is the precedence, and the precedence today is that the law says it will be regulated by the State Board of Insurance.

GAMMAGE : I am not arguing with that, but what I am talking about if we are going to have a strong and effective

deceptive trade practices act, if we are going to--is Senator Patman going to add another layer of protection for the public. If we allow the insurance industry's exemption to ride, then why not one for the automobile industry which is also regulated by another area, why not one for the whole retail industry which is supporting this bill and also under the regulation of the Consumer Credit Commission, why not retail--they also take their sales taxes through the Comptrollers Office. You know, I just don't understand it.

SNEAD : Because, Senator, this is the only industry--this is the only one of all of them in the state that the Congress of the United States has said to the state, you do it and created an agency to do it, and there has been that regulation. The power is there.

GAMMAGE : Then no other jurisdiction has dual regulation too?

SNEAD : So far as I know there is not. Now I have not gone out and checked. I am going to. All I know is that what I have checked so far as the model act as I understand it to be--it deals with and exempts where there is this kind of regulation.

: Can I be recognized on that point just for an example. I have two model acts here in front of me. This model consumer protection act says that actions or transactions permitted under laws administered by the state public service commission or other regulatory bodies or officer acting under statutory authority of this state or the United States. What that says that the other agencies can go ahead and regulate and that this act is not going to change their ability to regulate.

SNEAD : I don't read it that way, Senator. I read it as saying that those acts which are regulated are then exempt from this act.

: It doesn't say that.

SNEAD : It's exactly in there where you exempt the newspapers. It is the same thing. It's the same specific exemption.

: The next paragraph exempts the newspaper. We have adopted the next paragraph. This amendment that has been taken and that we have adopted puts in the first section of the

regulatory act. It exempts state agencies.

SNEAD : Senator, the only thing is that on the copy I have the heading of it is "Exemptions."

: Right.

SNEAD : And then it says, "Nothing in this act shall apply to" and all we are saying is--

: All right, what you can do on that-- Section 1, you can lump all those together and what that says is "state agencies" and no place does it say insurance industry or any particular industry.

SNEAD : It is one of those industries.

: No, this applies only to state agencies.

We did it.

SNEAD : That is what I am talking about--transactions which are approved by or actions--actions or transactions permitted under laws administered by the State Public Service Commission or other regulatory bodies or officers acting under statutory authority of this state or the United States. Now the exemption which has been in this bill 75--Senate Bill 75--takes out the part about other state agencies and limits it on the Federal Trade Commission.

: The part says "issued by other state agencies, boards, or commissions."

SNEAD : Senator, you are going back to Senator Gammage's amendment which is an amendment dealing and tying back together only in the legislative function of the executive body.

: Okay, let's go to that--

SNEAD : Now the judicial regulation is otherwise.

: Let's take that point for a moment. Are you presently saying that in its judicial function that the Insurance Commission has the last word on whether or not something is a deceptive trade practice presently under the law as it is today.

SNEAD : It has the--the aggrieved party has a right of appeal.

: Can they file a lawsuit ever?

SNEAD : Can they appeal to the court?

: Yeah. Can they ever file a lawsuit--
(inaudible due to overlapping conversations)

SNEAD : In my opinion they would have a right
to appeal from the--(Inaudible due to overlapping conversations)

: Is it not possible that under common law
action for fraud right now, the judicial function in determining
what would be a deceptive trade practices does not wholly lie
within the jurisdiction of the Insurance Commission.

SNEAD : There is no question that if an aggrieved
person has a cause and he has a claim there.

: Well, let's go to the present bill as it
is. The present bill sets out a procedure where they can adopt
the rules, not find facts, adopt the rules.

SNEAD : And it also finds the fact. This bill--this
bill--

: The Attorney General goes to the court and the
court is the one that finds the facts.

SNEAD : No, sir. Because he goes in and he makes
the determination before he goes into court.

: There is a detailed provision in here for
where he can adopt rules--additional rules-- to determine whether
or not something is a deceptive trade practice. Isn't that correct?

SNEAD : That is correct.

: Okay, then. After he has adopted a
deceptive trade practice, the Attorney General doesn't sue a _____
on his own motion, suddenly get a judgment against somebody for
violating that rule. He has to go to court.

SNEAD : What he does is to deal in the area of
17.46 with these descriptive phrases.

: Right.

SNEAD : All right. Let's go to this. The term false,
misleading, or deceptive act or practices included but is not limited
to be false. Causing confusion or misunderstanding as to the sources,
sponsorship, approval or certification of this should bar services.(?)

Now the State Board of Insurance can make one finding under this and the Attorney General can make another.

: But what does the Attorney General do when he makes his finding?

SNEAD : He then goes into court and files a suit.

: Presently under the law, cannot an individual make the same decision and go into court and file a lawsuit? Then what is the dif--the court can still find whatever they want to find.

SNEAD : Because of the fact of the _____ between the activities of the State of Texas on the one hand and the individual on the other, and the determination in advance of the Attorney General before he brings that action.

: The point that I am trying to make is that presently under the law what you are complaining about that you say what the bill will do already is a possibility under the present law?

SNEAD : No, sir. Again, I just haven't made myself clear to you. What we are saying is, one or the other regulate us, Senator. Either put us under the Attorney General and let him hire the actuaries, him hire the auditors, everybody go out and do it and let him have the whole authority, or put us over at the State Board of Insurance. But don't put us under dual regulation. That's all we are asking.

: All this bill does is just adds another cause of action or another lawsuit, type of lawsuit, and the person making the ultimate judicial determination is going to be the same, either under this law, this bill we are considering now, or under our present law, and it is going to be a court making a judicial determination.

SNEAD : Senator, I deeply respect your opinion of the bill and I hope that you will respect my sincere opinion to the contrary, but that is not the scope and the limit of this bill.

GAMMAGE : What the bill does is put you under the deceptive trade practices act along with every other commercial industry.

SNEAD : Senator Gammage, I did --

GAMMAGE : --and it gives the Attorney General enforcement power insofar as that act is concerned. It does not touch on the powers already residing in the Insurance Commission.

SNEAD : Senator, there is no more way that the bill here is weak compared to what the State Board of Insurance under Article 2121 defines, sets out what are the bad practices, everything that is bad, what the rules and regulations that you have before you this bill is weak. There is more regulation in the state than there is in this bill. But how can we determine--

GAMMAGE : You haven't been speaking to deceptive trade practices though.

SNEAD : Then I apologize to do it. Let me point out to you the provisions of Article 2121, and it starts out--"Unfair competition and Unfair Practices. (Mind you this is the model act which was adopted originally in '51. It was amended again in 1957, and it was amended again in 1969 after a long study of which--a committee of which Senator Blanchard was chairman)

GAMMAGE (?) : Let me interject one thing right here. Under that act, does the consumer have any remedy other than the common law remedy where he can recover only a specific amount of his damages for a deceptive trade practice. Can he recover his attorney's fees for a deceptive trade practice?

SNEAD : I do not think that he can do it at that level. He can if there is an unfair trade practice and a class action suit of fraud (?) he can recover attorney's fees--

: Deceptive trade practices?

SNEAD : Yes, sir. Now whether or not he has--

: I don't believe it is the same way, sir.

SNEAD : Well, let me say this. I've paid them (inaudible due to noise in tape)--and I settled a lawsuit in Harris County rather than to go to wire on it and we have sure paid the attorney's fees.

: Can you proceed individually?

SNEAD : Yes, sir.

: And recover his attorney's fees under--

(inaudible due to overlapping conversations)

SNEAD : What he does always, Senator, is he files suit under the terms of the policy. The deceptiveness does not come about until a claim is given. And then he files suit on the policy and Article 362 provide for the recovery of attorney's fees and he then brings an action to reform the contract to comply with what was the misrepresentation. So recovers under the contract and collects attorney's fees.

CHAIRMAN : If I may interrupt, I think the author wants to make a comment.

: Mr. Chairman, I really do. Bob, I have a very high regard for you individually and professionally, but Article 362 is limited to claims of health and accident and life insurance policies for a claim. You must first make your written claim to the company. If it is denied, then 30 days later you have the right to file a lawsuit. If the jury finds you are entitled to collect your \$50.22, or whatever it is, the court can also assess 12 percent penalty interest and attorney's fees. That has to do with claims. It has nothing to do with deceptive trade practice, does it?

SNEAD : No. Let me say this. What I was saying to Senator Gammage was that this does not arise in my area now--speaking about my people that I am representing, we don't have anything ever come up unless a claim is denied as to deceptive practice.

: (Inaudible)

SNEAD : No, wait a minute, Senator. What I am saying is, we don't have any deceptive practice problems ever arise as far as our policyholders until that policyholder files a claim and that claim is denied. Now when that is done, then is where a suit is brought on a misrepresentation to reformation of the contract and an action brought and asking for attorney's fees.

GAMMAGE : Can you show me one case in the books

anywhere in Texas where there has been a deceptive advertising claim filed under Article 3.62?

SNEAD : Now, I don't think--I don't think I am with you. Let me say this. You have a claimant who as long as he doesn't have any claim against the company, he is not going to assert misrepresentation.

: Get hurt or if he doesn't die.

SNEAD : Then when he dies--when he comes in and he files that claim, what does he do? And it is denied. He then comes in and says, "This policy was misrepresented."

: Oh, he says, I have a claim under that policy.

SNEAD : Right.

: I got hurt. My hospital bill was \$126. Under the terms of this policy I was supposed to get \$86 of that. They have refused to pay me my \$86. I asked for \$86 and I asked the court to assess 12 percent penalty and interest and my attorney's fees.

SNEAD : And what do you do when they deny liability?

: I prove that he had \$126 hospital bill, that under the terms of the policy they are supposed to pay him \$86, and then by operation of law, the court can assess 12 percent penalty and interest and attorney's fees. It has nothing to do with advertising whatsoever.

SNEAD : All right, and then if there was a misrepresentation, then the way it is handled today is, you come in and file for reformation of that policy because here is a piece of advertising that says this is _____.

: No I am suing for money damages under 3.62 and that's all I am suing for.

SNEAD : Well, let me say this my people have paid a whole lot--if you are correct, Senator, my people have paid attorney's fees that they should not have paid. And I don't mind any way shape, form or fashion provided in the law that the State Board of Insurance can put attorney's fees on us, or that you can add collect attorney's fees in that sort of a situation.

GAMMAGE : I tried the first medical payment case that ever went up under 3.62 and it was not stipulated.

SNEAD : But we are happy to have it. Just-- in other words if you want to say and add on to this bill, you say that the State Board of Insurance can levy fines against these people for any sort of this practice that is set out in the law completely in much more detail and much more regulation than is this act and if you want to say that if there is _____ deceptive practice, then there is a right of attorney's fees, that's fine. All we are saying in this complicated business where the federal government has said to the state, you regulate it. And you recognize in this bill the Federal Trade Commission. You recognize _____ regulations that it had and the arm that has been adopted in this state to exercise that function is the State Board of Insurance. So, give them the authority and put it over there and we will not object. What we object to is--

PATMAN : Pardon me, but they have all the authority they have asked for, haven't they? Isn't that right? Isn't that right, Mr. Cotton? You all have all the authority you've asked for?

COTTON : For one exception.

PATMAN : What's that?

COTTON : A year ago--one bill last year on election machines.

PATMAN : Well, so far as you know, Bob, that's true, isn't it? They have got all the authority they have asked for?

SNEAD : I am not conversant with that because I am not privy to what they are--

PATMAN : Go ahead. I am sorry to interrupt you. Go ahead with your conclusion.

GAMMAGE (?) : One more point before you draw your conclusion and that is, under 3.62 you were talking about wrongful failure to pay a claim under the contract. We are not talking about misrepresentations made as an inducement to purchase or to conclude that contract. We are not talking about advertising practices, are we? We are talking about the terms of the contract-- it may be practice and wrongful failure to pay a claim in the contract.

SNEAD : Here is what the sophisticated lawyer that comes in now. If there is any smidgen of misrepresentation, any question of false advertising, misrepresentation, the standard approach that is made now in the courts--and let me say this--we haven't had hardly any in ours, but the cases that I have read and I have seen indicates the smart lawyer when he comes in and he says, I have a claim. This policy was sold on a misrepresentation and here it is. So I ask the court to reform the contract and simultaneously pay the claim. And then he gets attorney's fees on it. So the net effect is--that's how you do it, and you do pay attorney's fees.

: 3.62 in your opinion does speak to deceptive representations--representations that are made as an inducement to purchase that contract?

SNEAD : It does in a practical effect where you have the misrepresentation because if I misrepresented it, the court is going to reform the policy contract to the misrepresentation.

: That is the misrepresentation as to the definition or the meaning of terms in the contract?

SNEAD : That is correct. If I gave--

: But outside the representations made as an inducement aren't covered, are they?

SNEAD : Let me give you an example of a health insurance policy. If the representation was made ending that the advertisement was made that there was no waiting period or there was no pre-existing conditions, and the policy was issued and there was a pre-existing condition, then the claimant comes in court, says this is my policy, this would be the ad that I bought upon or the representation that I bought upon, reform the contract, give me my claim and attorney's fees and 12 percent penalty. And that's what the courts are doing.

: Now, one step farther. In the Deceptive Trade Practices Act that's presently on the books as it was enacted in 1967, was there any exemption for insurance?

SNEAD : Yes, sir.

: In 1967? From 1967 to 1969 was not the insurance industry included? And in 1969 you got your exemption?

Isn't that correct?

SNEAD : I can't answer that.

: I believe if you checked it out that you would find that's correct. The City of Dallas today, that's the insurance capitol of Texas, has a city ordinance, does it not, on deceptive trade practices? It does not give any exemptions to insurance even there.

SNEAD : I am not conversant with it.

: I think if you will check, you will find out that it is correct.

I just have one more point-- Going back to this uniform bill--if we accepted the interpretation that you make of the exemption which is actions or transactions permitted under a _____ (inaudible due to cough in microphone) by the state, and we accept your interpretation, would that exempt the insurance industry?

SNEAD : I think this--now, I would like to see it clarified because I think it ought to be cleared. All I am saying is, and urging, is that one place a--

: In the beginning--okay, let me finish--

SNEAD : (Inaudible due to overlapping conversations) don't _____ what Senator Gammage has suggested by his amendment in the rule-making power. Then tie it down also in the fact-making and judicial functions.

: Even if we adopted this language that you say here--exempts the insurance industry--any control--you in fact would still be unsubject (?) to this act because by your own testimony, your administrator or whatever he is does not approve advertisement as being acceptable. He says at the present time this is not deceptive. Anything can change.

SNEAD : Wait a minute. I didn't understand your question, Senator.

: You were testifying a while ago about how strict the regulation was--that the Insurance Commission puts on to the insurance companies having to do with advertising. They have to submit it in advance--

SNEAD : That is not required.

: All right, if they submit it in advance the Insurance Commission considers it, and then they don't even give a stamp of approval to it.

SNEAD : They say it is--we accept it as of now subject to if you change.

: That would come within this exemption, even the way you read it because that is not approved action. That's the conditional approval.

SNEAD : Senator, somewhere, somewhere anybody is entitled to a determination.

: And that's the point I want to make. The only place where it is now under present law where it will be in the event that we adopt Senate Bill 75 is in the courts.

SNEAD : Well, I think we are a long way apart because if that's it, then we--then the Federal Trade Commission has the whole regulation because we are in violation of Public Law 15. It is not only that the state seeks to regulate in order to maintain the continuation of state regulation, but the state must actually operate. In other words, if the state does not regulate, you can pass a dozen laws. If the state does not operate, then the federal government is regulating. Now, the point is that we are in a great problem of controversy and quagmire as to when is the state going to continue or when is the federal? And it is a very touch and go thing. We like and we propose state regulation, but the federal regulation is right upon us. Now, either we ought to be under the Federal Trade Commission, and this was our controversy this was the litigation with the Federal Trade Commission and the Fifth Circuit held that the state does do it. We ought to either be under the Federal Trade Commission. We ought to either be under the State Board of Insurance or the Attorney General. And all we ask, and all we urge you, puts us one place or the other. Either give us to the State Board of Insurance. If it needs to assess additional fines of \$2,000 to \$10,000 instead of \$50 to \$500 as Article 2121 provides, then raise the limit. If the attorney's fee provision as Senator Mauzy is pointing out needs to be expanded, then expand it.

Just put us one place or the other. This is all we are asking.

CHAIRMAN : Thank you.

ANDUJAR : I shouldn't say anything because you are lawyers and you are deep into this, but this says in plain English--

CHAIRMAN : The Chairman is also not a lawyer--(Laughter)--So you ask it.

ANDUJAR : Sir, isn't the Insurance Commission a regulatory body of the state?

SNEAD : Yes, ma'm. I asked them up there to get the information as to how many companies have been dealt with, and since Mr. Odom has been in up there as head of this Department, 26 formal hearings have been held or scheduled as unfair trade practices for misleading or deceptive trade practices. Twenty-three cease and desist orders have resulted from these hearings. Most of these companies or agents have been required to submit future advertising for review by this Department until it is felt that voluntary achievement will be accomplished. Two of the companies involved are still submitting there advertising for review prior to--approximately 50 companies have submitted their advertising for review prior to its use with any necessary changes being made. The above does not include the review of advertising rules used in connection with participating life insurance policies. Such review resulted in approximately 45 such forms being withdrawn or disapproved. This is a continuing process that is accomplished in connection with the submission of any new participating life insurance policies which may appear to lend themselves to misrepresentation.

CHAIRMAN : (Inaudible)

: Mr. Snead, how many people got their money back?

SNEAD : I would say this. Wherever, and again, wherever there is an arraignment (?) with the Department's findings --I don't know what they do to other people's findings--but I know what they do to my clients--and we if we've got a misrepresentation the first thing they do is say, all right, are you going to make everybody hold (?).

: What in fact that would be _____?

SNEAD : I can't answer that because I am not privy to--on the thing at all. Frequently what's done is to write everybody a letter--to answer--to inform them of where--this is one I did--where nobody thought that the error was in there and the question was raised by a man in Houston and there were ten thousand letters written to the policyholders of that company and they didn't all receive the advertisement whatsoever pointing out exactly what was the question that had been raised by one policyholder--one--and, then in turn saying, this--so there will be no question, this is it. And anybody that wrote back and said, I want my money back was paid their money back. And every policyholder of that company was sent a letter back to that effect because one policyholder filed a suit. And I assure you that that Houston attorney was paid an attorney's fee.

: The law was here in compliance.

SNEAD : And everybody was just as innocent as they could be and the first thing as soon as it developed and as soon as we found out about it, we went to the State Board of Insurance.

: Do you think the situation would be any different in this situation if this bill was enacted?

SNEAD : Yes, sir. Because I think there can be _____ (inaudible due to overlapping conversations).

: Do you think where there is good faith action or good faith acts or omission that are errors--faith in error and bona fide error and there is nobody trying to shaft anybody else, do you really think that this thing is going to affect you topside or bottomside?

SNEAD : Yes, sir, where there is the dual regulation. This is exactly the problem that occurred between the Federal Trade Commission, Public Law 15, and the State of Texas. Who is to control?

: What was the situation during that two-year period when you were not exempted?

SNEAD : I do not know, and I apologize, but I do not believe that that has been in there. So far as I know we have all tried to comply just as the best we can.

: I think we had a thriving insurance industry during that two-year period. Nobody was disqualified (?)--
(End of Side 2 of Tape 2)

TESTIMONY ON S. B. 75 BEFORE THE SENATE COMMITTEE ON HUMAN RESOURCES
SENATOR BROOKS, CHAIRMAN
February 14, 1973

Tape 2, Side 1

FONDREN : --It is number 21 on page 5 and then on page 6 beginning with Section 17.47, sets out the rule-making procedure that the Consumer Protection Division may follow in adding deceptive practices to the statute, and the quarrel certainly is not with the manner in which rule-making power procedure is carried out. I point out to you that this is the delegation of authority to extend this legislation--to extend the statute by rule-making--making it _____desirable and this is clearly a matter of legislative determination.

CHAIRMAN : Senator Gammage.

GAMMAGE : Mr. Fondren, under a present law the following additions it is also _____(inaudible due to cough in microphone) the Insurance Commission of Texas, Motor Vehicle Commission, Board of Regents of the University of Texas system, Parks and Wildlife Department and the Alcoholic Beverage Commission, other states giving similar power to the Attorney General's Office--Massachusetts, Illinois, Idaho, Maine, Vermont, New Mexico, New Jersey and North Dakota and Iowa. So it is not unique.

FONDREN : Senator Gammage, I have not looked at all of those. One you mentioned, of course, it is an obvious one that I would look at--it is the Texas Motor Vehicle Commission. I would have to respectfully disagree with you sir that that kind of power is granted to the Texas Motor Vehicle Commission. Their rule-making power is this--the Commission after hearing shall make, amend, and enforce rules reasonably required to effectuate provisions of this act. I would respectfully suggest that, Senator Gammage, that rule-making power granted here goes far beyond carrying out the provisions of the act because in effect it allows new provisions new deceptive trade practices to be established by rule-making.

GAMMAGE : Not in the _____position where the amendment to be added a while ago. (Not clearly audible)

CHAIRMAN : Senator Clower.

CLOWER : On this originally 17.47 you will agree that these new rules hidden when they are made are not going to be

made in the dark someplace.

FONDREN : Yes, sir. I compliment the drafters of the bill on the draftsmanship in providing for the procedure, Senator.

CLOWER : It is going to afford notice on one (?). I would just like to make one additional comment about the Texas Motor Vehicle Commission. They have in addition to the power to make rules, they also contain a _____ provision in there if someone violates one of those rules that the Commission makes.

FONDREN : Yes, sir. I think the rule-making power of all of the agencies that I have looked at including looking at least one constitutional _____ this way. I simply have not found and I don't say this is not fair, but I simply in the short time of it, have not found one where this extension of power is granted. The Comptroller's Office for example who is another constitutional _____--his rule-making power is quite limited in comparison to the language contained in this bill in my opinion. The federal court recently limited or stated that the Federal Trade Commission did not have the power that it tried to exercise in this very area saying that it was attempting to exercise the power it did not have. Finally, in this regard assuming that other state agencies might have the power you've indicated, we suggest to those of you who are on the committee who are lawyers as I am, therefore, I feel like I can say this that we lawyers like to win cases, and the Attorney General of Texas is the lawyer for the state and he has powers to prosecute powers to initiate actions under this bill, and at some point in the distant future I think we should recognize that some lawyers might be sorely tempted to extend the rules and to write the rules that might be helpful to overturn a case that would change the outlook of a case. Again, let me assure you that that's is not a personal reflection, but I was simply recognizing that you are placing in one agency and in one body the power to write the rules, the substantive rules of determining

what is or is not a violation of this act, and then to prosecute and to initiate actions under the act. I think even more serious though, if I might hasten on, is the delegation of power of this act, legislative power to the courts of this state under the act. Under Section d, page 6, I thought--

CHAIRMAN : Mr. Fondren, excuse me, Senator Gammage wanted to make an observation on this last report.

GAMMAGE : I beg your pardon. I don't want to pick-nit on the agency power, but it has been pointed out by Senator Clower that the adequate motion provisions are required, that it is not done in a vacuum, that it is not done in the dark, that it is done to promote the proper enforcement of the intent of this legislation which is to clean up the marketplace of Texas, consumer and legitimate business operations. As far as the ability to set out and finance specific actions in violation of this proposed law, the University of Texas Board of Regents can define crimes under Section 51.202 of the Education Code. They can declare certain acts to be misdemeanors. I certainly don't approve of that for them.

: It might be _____ for them but--
(inaudible due to overlapping conversations)

GAMMAGE : I certainly don't approve of it.

CHAIRMAN : Mr. Fondren, go ahead.

FONDREN : I think of even greater concern is in terms of the application of the act is the provision on page 6, Section D, which in effect allows the court to legislate new deceptive trade practices. And the concern here is the practical effect of permitting this delegation or of authorizing this delegation of legislative power. Let me suggest to members of the committee that a person could bring a suit against me alleging that some practice that I was engaging in was a deceptive trade practice. They alleged it not because it was delineated to statute, not because the Attorney General had promulgated a rule or regulation saying it was _____ practice. It was simply alleging that it was deceptive. If I defend that suit and if I go to court and lose the case and the

final judgment is against me and the court of this statute says yes, that is a deceptive trade practice, and not only am I then subject to the consumer remedies in that case, but I then become subject under this bill to a class action suit on a what has now been ruled to be a deceptive trade practice by the court on a practice that at the time it was engaged in was not known to be a deceptive trade practice. That sort of delegation of power it seems to me is unjustified and I am _____ it and eliminates-- creates a great body of uncertainty. It has a great sledge-hammer effect on the inability or the ability of the defendant to take the chance to assert his rights. Because if he loses, no matter how small that case, then he becomes subject to a class action on a matter that was not heretofore known by anyone to be deceptive under the terms of this statute.

: Under 17.53, doesn't it cover that?

It limits a class action--any practice or type of act _____ is previously declared unlawful, deceptive, or unscionable, or--

FONDREN : I am sorry--go ahead--I don't have the full--go ahead and say the or that it is found to be--by the court?

: --the court would be the subject of the class action--in the middle of the page--beginning at page 14, Section 17.53--class action is available only as to an act or practice previously declared unlawful.

FONDREN : Yes, sir. After that previously means previous to the initial determination--to me, it reads that if a suit has been brought and the court has found it to be unlawful or a deceptive practice, that then the class action--I mean that's previous to the class action. Perhaps, I am wrong, Senator, but I think to me if the court finds it to be unlawful or deceptive, that is a previous finding and a class action can be brought.

: Well, the way I would read that would say that a class action would only be available in the case where something had been declared to be an unlawful act, either by the statute of the court prior to the time that party engaged in it.

FONDREN : I hope that is what it means. I would hope the committee would clarify it to be sure that it means that. I

think you can see the tremendously onus burden that a defendant is placed under in going ahead and asserting his rights defending himself when he is confronted with--if he loses with that very serious possibility.

CHAIRMAN : Senator.

: The language is pretty clear here. It speaks to judgment of the appellate court of the proper jurisdiction and being in this state that has been recorded--it says--you know, it is on the record. And aside from the language set out in this bill--it might already--go ahead and point out that there is currently a sales case here in the Civil Appeals Court in Austin, the Westward Case (?). The Court of Civil Appeals said that it had that authority.

FONDREN : What authority, Senator?

: To declare this a deceptive trade practice.

FONDREN : All right. Well, if I might add one other thing--

: I think as a practical matter also. There is a two year statute of limitations here and as a practical matter that kind of lawsuit to be filed to be litigated, to be appealed gotten up to the Supreme Court for a final determination, your two years will have already run.

FONDREN : My interpretation would be, Senator,--you are a much better lawyer than I am--but my interpretation would be that until the court found it to be a deceptive trade practice, the statute could not run. It would not run because there would be no motive to pray--it was not such a practice until the court found it to be so.

: But the applicant (?) is taking place before it originated (?)--is what I am saying.

FONDREN : I am frankly fearful that that would not be adequate protection, that there is a grave doubt here that you would not be subjected to a class action _____. You may be perhaps right, Senator. It seems to me that that's a matter that the committee needs to carefully look into.

One final comment, Mr. Chairman and members of the Committee, if I might make it, would be with regard to the

section on class action. Again, the drafters of this legislation ought to be highly complimented on delineating and limiting the circumstances under which a class action can be brought in connection with this bill. They have done a most careful and expert job of draftmanship on the class action section. My purpose in mentioning this is to suggest to the committee simply for your consideration whether or not a class action, a statutory class action, is appropriate in these consumer matters? Simply because I am old-fashioned enough to wonder whether or not, or to at least believe that whenever the power and facilities of government, in this case the State of Texas, are to be applied to resolve a private controversy and a private dispute that great caution and great care needs to be exercised. I simply would like to propound the committee a couple of questions in this regard and that is whether or not a good consumer purpose is served by providing for class action. And, of course, only you and the legislature can answer the question. Number 1 I would ask whether or not a class action provision is needed to compensate consumer--a consumer or consumers for an injury sustained in this bill, or under the terms of this bill. I simply suggest to you that under the bill without the class action the consumer can obtain damages, treble damages, punitive damages, attorney's fees, court costs, and other relief that may be described by the court, including restoration of property and the establishment of a receivership to insure the protection of his rights and the securing of a collection of a judgment. In view of that I propound the committee whether or not a class action is needed to protect or to provide compensation for the injury that might be suffered as a result of a violation of the act. Secondly, the question it seems to me about class action is whether or not it is needed to prevent the retention of ill-gotten gains. And I think that there are cases in which this clearly is the case. I think the anti-trust cases, I think that the deliberate fraudulent scheme cases where stock frauds and things of that type are perpetrated, almost demand a class action. But I would suggest that there recovery is unlikely in any event. And in fact the

provisions of this class action section are more likely to be _____ or applied in nearly every case to the legitimate business person with very harsh economic consequences. And would simply point out in closing to the committee that the trend seems to be in consumer matters and in particular in Truth In Lending matters to be by the courts, and a number of states to be waived on the committee is the plaintiff's class action.

Let me say to you that if this committee and if this legislature decides on class action that the people who have drawn this section of the bill have done a most excellent job. And if you are going to adopt one, I would commend this one to you, but I simply want to point out the possible consequences and also to point out that this is in the face of what the courts have found in handling class actions in consumer areas and particularly to the limit.

In the Ratner Case in New York the court said this: "The allowance of thousands of minimum recoveries to like plaintiffs carried to an absurd and stark finding extreme is specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement. Proposed recovery of \$100 each to some 130,000 class members would be a horrendous, possibly annihilating punishment unrelated to any damage to the purported class or to any benefit to the defendant of what is at best a technical and debatable violation of the Truth In Lending Act." This obviously is a case which does apply to the legitimate business person who finds himself charged with a violation or in violation of rules and regulations and statutory enactments. In the Shield Case -- "At a time when large business firms in general appear to be a scapegoat to a great many of our nation's problems, the courts should not gratuitously add the final straw. The Truth In Lending Act has laudable purposes, just as I submit this act had laudable purposes, many which we endorse, and should be strictly enforced by the courts, but it should not be allowed to be used as a means of oppression or harrassment or unjust enrichment. An interpretation of the Act to allow actions such as sought by Mr. Shields could be the means of curing an illness by killing the patient, and in the process promoting unnecessary litigation

mainly for the benefit of a few lawyers ready and willing to promote such cases."--quoting from the court in that case.

I appreciate very much your attention, lady and gentlemen. Thank you for the opportunity to appear. I will be glad to try to answer any questions.

CHAIRMAN : (Inaudible) If there are no other questions, thank you very much, Mr. Fondren. We will now call Will Davis.

PATMAN : Let me ask the author something, if I may.

CHAIRMAN : Senator Patman.

PATMAN : The term misleading or deceptive actual practices included was not limited to the _____--passing off goods or services as those of another--what do you mean by that. I really--

: This is in the current Consumer Protection Bill.

ANDUJAR : (Inaudible) --an example or something.

PATMAN : Is that going to be clear to people who read that?

ANDUJAR : It would be obvious to the people selling cars saying that they were Chevrolets when in fact they are not?

PATMAN : Well, couldn't we clarify that a little bit?

: It is a _____, Senator, that comes out of the _____ Trade Practices Act which has been adopted by almost 50 states and a big _____ of them all are behind it interpreting that phrase.

PATMAN : Well, does it seem crystal clear to you?
: Well, not on its face--(inaudible due to overlapping voices).

DAVIS : Senator Brooks, I wonder if the committee would not mind if Mr. Robert Snead might precede me. I will follow him immediately. We have kind of rehearsed this and we think we can save your time if we will take it that way.

CHAIRMAN : I will be glad to. The Chair now calls

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Mr. Robert C. SNEAD, Vice President, The Dynamic Tower (Dallas)

SNEAD : Mr. Chairman and members of the committee, my name is Robert Snead and I am representing the Texas Association of Life Insurance Officials. This is the trade organization of the very small life companies in Texas _____ associations and many of them are mutual companies in nature. At the outset let me say that I would like to limit my remarks to the one area, the area of seeking the inclusion within Senate Bill 75 of the same language or the exemption of whatever you would like to call it that now exists under Article 50.69-1003. Each one of the exemptions dealing with the present law have been brought forward into Senate Bill 75 except the business of insurance, and I feel that when any industry or any person appears and says, let me out, that they have the absolute duty and burden to establish the justification of that.

Will and I discussed it ahead of time to try to deal with it, divide up the points so that we would not be duplicators or take up more of your time than was necessary. But we do feel that the discussion, the background and the justification should be made and should be made plain and clear.

First of all, I think it is a question of what is insurance? What's the problems of insurance? Where does it exist? Why doesn't the public like it? It is a necessity. Something we all buy. We all pay premiums for. And generally we get mad every time we pay the premium and the question is why and how and what is it?

Fundamentally, it is a deal that is made between two individuals. It is a piece of paper that says, you pay me now or periodically and in turn happening or based upon the happening of the contingency, we will do something for you in the future. And this is the most difficult, troublesome area of all the portions of the world of commerce because it is the taking of the money now and promising to do something in the future. And this has been dealt with time, after time in trying to come up with the solution of the regulation and the dealing of these particular problems.

Now, insurance today is in my opinion, and if I may say so, totally regulated. It is regulated by an agency, an arm of the state which exercises both a legislative and judicial

function. The bill you have before you likewise exercises or proposes and authorizes the Attorney General to exercise legislative and judicial functions. The rule-making powers the determination of what is or is not involved or a violation the deceptive practice or what have you is a legislative function. The interpretation, the meaning, the finding of fact, and in effect the conclusions of law as to whether or not this is a bad trade practice or deceptive or false advertising is a judicial function determined by that commission. Now at this time the legislation or the Insurance Department exercises these two functions. Now the reason I am bringing it out in the very beginning is that the amendment which Senator Gammage offered says and in effect and deals with an attempt to say there can be no conflict in the legislative function, that is, in the prescribing of rules, but it does not deal with the conflict in the judicial function, the making of the findings of fact and conclusions of law.

(?) : Mr. Sneed, aren't you subject to dual regulation in that respect already?

SNEAD : By whom, sir?

: By the courts of this state. Insurance companies are--

SNEAD : No, sir. It is the determination of the practice, the finding of the fact. You see at this time, Commissioner Cotton here can, if he wants to and believes that he has the justification for it to write one piece of paper and sign his name and send in his staff to take over any insurance company in this state like that.

: Do you think that any of this allows the Attorney General to do anything in conflict to that?

SNEAD : What it does is, it will allow the State Board of Insurance to make a determination of a fact this is or this is not false advertising, and it allows on the other hand, the Attorney General to make the same determination. As I was discussing with my neighbor down town about it and we were talking about it and I said, it is like this. You and I have a lawsuit and we tried it in the 53rd District Court here and you get a jury verdict there, and

then we tried the 98th District Court and I get a jury verdict. Who wins? In other words, the Commissioner or the State Board of Insurance can make a finding of fact and law; the Attorney General make the other, and we are in the courthouse.

: Well, I think bill recorded that, doesn't it (?)?

SNEAD : Rule-making. It does not, and the amendment to the--the point I was making and I will say it again. The amendment that was offered deals only with the elimination of conflict in the area of the legislative function, rule-making.

: What fact finding is it that would give you a problem?

SNEAD : Well, we give you an example, and this is in the health insurance field--there are three classes of policies. The permanentable at the option of the company, the guaranteed renewable and non-cancelable. Now for many years in the state, the advertising was, this is a non-cancelable policy. The normal individual understanding of that is simply this. If it is non-cancelable, the company can't cancel it. Now that is not what it means at all in the rules and regulations of the State Board of Insurance. It is one that cannot be changed under any--you cannot adjust the rate. Now, if you have the right to adjust the rate, then you can only advertise it as guaranteed renewal. Now these are words of art, not the normal common law meaning, but are words of art that are specified. They have a specific meaning. For example,--

: Well, what you are saying is that the Attorney General might look at it as a _____ (inaudible due to overlapping conversation)--meaning--

SNEAD : He might say it means this. The Board say it means this, and the companies are functioning under this regulation and the State Board of Insurance is functioning, interpreting on a national basis as is, passed on through the NAIC which is the National Association of Insurance Commissioners, and you get one specified meaning and then you get the Attorney General taking a different one, and the company gets then caught in between.

: Well, aren't you subject to the same

problem presently in the current law because some person out there feels aggrieved by this case still going to court now? (?)

SNEAD : They certainly can, but you see the placing of it at this time puts two governmental agencies taking affirmative action. It is a whole lot different to be sued in the courthouse by an individual than it is by the Attorney General. Now, and, in addition to this, the Attorney General is the attorney for the Board. If there is a proceeding, a _____ proceeding to take that company's charter away, stop it from doing business, close it up, put it in receivership, all these things, he is the attorney for the Board. Now suppose they had a bill differently. What we are basically saying is that we don't seek to duck, dodge, or run away, but we have here a very detailed basis of this regulation. If I may go into the history of it--

GAMMAGE : Excuse me, again. Mr. Sneed, one question. In other states in the other jurisdictions that do have this rule-making power and do have this judicial authority will determine that vested in the Attorney General's Office and in other agencies, are you aware of any conflict where these words of art or any other kind conflict like this has arisen?

SNEAD : From the discussions I have had with the various people that are within the industry, always it deals in the area with the insurance governing body, the Insurance Department or the Commissioner, or whatever it be in the various states, the one where the paramount controlling jurisdiction is vested.

GAMMAGE : Well, don't you think that even in this situation, even in this bill, that the Attorney General would feel bound by it? Certainly, the courts would hold him bound by the traditional words of art in terms of the trade?

SNEAD : Senator Gammage, you know I grew up with John Hill in effect--General Hill, I apologize--and I have got great faith and confidence in him, but I do not know--(inaudible due to overlapping conversations).

: _____ (inaudible)--talking about whoever _____.

SNEAD : No, sir, I think that we are drawing the

distinction here of government by men or government by law. We feel, and we would urge this Senate to regulate, put it on but put it in one spot. Like General Hill said, the public is entitled to know where it goes--I don't want to misquote him here, but he said, they are entitled to know where the agency is, and the public now knows where that agency is.

GAMMAGE : The problem here though is what remedies do the consumers have under that agency right now?

SNEAD : To the best of my ability, Senator, to examine and compare them all, and, let me say this, some of the state regulations goes beyond this bill. For example, as I read this bill, it does not deal with the interstate advertising and solicitation in this state. Now, this State Board of Insurance and the people I worked for came in and I lobbied on the bill, and in 1967 immediately following the denial of the writ of certiorari in the Minister's Case (?) out of upholding the Wisconsin statute, which is in effect a long arm statute, we came in and went before this legislature and there is even regulation of non-admitted carriers in this state by the State Board of Insurance.

Now I was down at our little place in the country. The neighbor gave me a solicitation. It came from out-of-state, and he said--he runs a ranch down there--and he said, this looks pretty good. He said, "For fifteen dollars I can get all this basket of treasures, and a \$250 vacation because they said my name came up on a computer, and of course, it was a printed deal. And he said, "What should we do?" "We would like to go to Florida." Now, Mr. Manford and Mr.--I told him not to do it--(Laughter)--but now that sort of thing in the field of insurance is regulated because of the statute. Now, I don't believe this bill goes that far because it does not include the provisions that Mr. Manford worked so long on putting that in. Now all we are urging you is to put us someplace, put the authority there--if we are bad, close us up and give us a penalty. Now, as the law now exists, we think that exists, and there are only three differences that I can find, and I may ____, between Senate Bill 75 and what is the combined authority of the State Board of Insurance and that is in this area--one, there is not the

treble damages. Two, there is not the authority for the Attorney General to bring a class action suit or the City Attorney or the District Attorney. And last, our fines aren't as large. Now there may be that I have missed some of this.

: You missed attorney's fees.

SNEAD : No, sir, it is already in the statute. In other words, on any life, health, or accident policy that my people don't pay and you file a suit against them for--we say that--

: Deceptive practices?

SNEAD : It would lie in the area of a class action suit brought by a series of policyholders against the company.

: Wouldn't it have to be a common law action of fraud though?

SNEAD : I don't think it's misrepresentation. Any of the grounds for a class action suit is now exists, and I am certainly no expert, but any ground that you can now bring a class action suit. These standards in here pretty well follow the standard within the federal law as I understand them. So what you are bringing in is that specifically and you are setting it up and you are giving to the Attorney General the right to bring this action.

: You are giving a private right of action.

SNEAD : A private right already exists.

: That's the problem. That is one of the reasons why we have got this bill now is because the private right of action does not exist.

SNEAD : For a--well, let me say this--there have been some filed, and it has been settled. And I do not read--you are referring to this Supreme Court opinion and _____ (?) Case --I do not construe it to mean that you cannot bring a class action suit. I think that we can.

: (Inaudible)

SNEAD : The practical effect of that case was and I think the guidelines laid down to the court are very similar--to exactly what the guidelines are that you have here. I think that the main issue is duplicity of regulation. You see, you can't really pass upon a policy of insurance as to whether its advertising is or is not false without having in many instances an actuary, an accountant, an examination of the company, and as it exists right now--and I have here, let me pass these out and just completely out of order. These are the latest rules and regulations of the State Board of Insurance and guidelines established by the Commissioner dealing with--each company has to keep for three years every piece of advertising as to exactly the _____ exactly what they put out in advertising. Now, as far as I urge my clients, I urge that they never issue a piece of advertising until they have come down here to the State Board of Insurance and submit it, and even then when they get through, you've got the Deputy Commissioner, Mr. Don Odum, and when he goes over it you have got a whole department over there to review all advertising and he won't even permanently approve it. He says, "At this time, we have no objection." And if anything then develops, he immediately withdraws it. You see--

: Let's get back to this problem--this right of action--(inaudible due to cough in microphone). Isn't it a fact that under that statute that you mentioned where you are entitled to attorney's fees. That's limited strictly to wrongful--

SNEAD : You've got a claim, but--
: --wrongful failure to pay a claim. Isn't that right?

SNEAD : That is correct.
: It doesn't have anything to do with deceptive trade practices, does it?

SNEAD : Well, deceptive trade practices you are speaking of now, Senator, in relation to a class action suit.

: I am talking about just one single individual wants to file a common law action for fraud against an insurance company based upon their advertising. He is not entitled to get attorney's fees, is he?

SNEAD : I would say that is correct. You are talking about a single individual filing suit. Now do you--

: --in many cases there is recovered mainly attorney's fees--(inaudible due to overlapping conversations)

SNEAD : Let me point out the difference now between what is the regulation--the regulation of insurance and the normal business. You see an insurance company pays a premium tax, and that premium tax in part goes for the state to hire attorneys to look after these people, to set up the examiners and do everything that's legal. Now the first thing that occurs if that is false advertising is it goes to the Commissioner and the first thing they do over there is if there is no fact question--and if it is false, just like General Hill was saying, if it's bad, they are going to say, we are going to put you out of business, or we are going to get all of that straightened out and there is not the necessity for an attorney because the state is already furnishing attorneys to handle it. And the _____ to enforce it.

: And the individual involved gets compensation.

SNEAD : He would go to the Insurance Department.

: And the company would give him his money back?

SNEAD : And the company--when he said, you are either going to do--you are either going to get satisfied with the public and take care of them, or I am going to put you out of business. Now, the penal--the penal provision, the penalty--the penalty is that you have the authority, and where the greater strength is in the

Insurance Department if there is an offense. If something is wrong, the Commissioner can by one signing of his name take away that authority to do business. By the signing of his name he can take over that company and run it. He has a whole staff set up over there for one purpose--the liquidation division, and any time an insurance company is insolvent or in conservatorship or what have you, he takes it over and runs it.

: Well, we are not talking about controlling the insurance companies here. All we are talking about is deceptive trade practices.

SNEAD : Well, no one--Senator, what your interest in is, is to protect the man, the public. So if he had been defrauded, he gets his money back. Now if it is the ABC Sewing Machine Company, there is nobody that--regulating his business that can close him up, that can take him over and take away his right to do business. He can continue to keep on doing business. When this man over here says, you are going to stop, and you are going to take care of these people, then you pay the money back. So what you have is, if you are saying here--the distinction is here---you are saying that this man doesn't have an attorney to represent him, so pay that attorney to do it. What is happening in the process of regulation is that the state through the tax on the insurance company is furnishing an attorney and an _____ to represent the public to make that take place.

: Mr. Chairman, I wonder if we could recess for an hour?

CHAIRMAN : Senator Patman suggests that we might want to recess here. We do have four witnesses to be heard.

: How many witnesses do we have, Mr. Chairman?

CHAIRMAN : We have three more witnesses to be heard. Mr. Davis and Mr. Winters and Mr. Tigner. Mr. Davis has indicated that he probably would not take much time, but there are three here.

PATMAN : It will take us quite a while to vote on this--

: Let me ask this--in view of the magnitude of the testimony, both of Mr. Fondren and Mr. Snead and the offer of some amendments, what about--can we continue this tomorrow? What is the pleasure of the Chair in scheduling it tomorrow?

CHAIRMAN : I really, gentlemen, would like a little bit of a response from the committee because I think it might be very wise to set it tomorrow, and then the people who have not had an opportunity to be heard--two of the people who are to testify are from Austin and I don't think tomorrow would be too bad an imposition on them. Mr. Davis and Mr. Winters, could you come tomorrow?

DAVIS & WINTERS : Oh, yes.

CHAIRMAN : How about Mr. Tigner?

TIGNER : I will comply to your wishes.

CHAIRMAN : Well, we don't want to inconvenience you. Well, you could stand another day in Austin? (Laughter)

TIGNER : I will be glad to--
: Senator Brooks, are there any schedules in the morning?

CHAIRMAN : Yes. Finance has _____ in the morning and then there is also a _____ (?).

: What time does it go in?

CHAIRMAN : Ten thirty.

: Education won't meet in the morning.

: We can finish up tonight, Mr. Chairman.

CHAIRMAN : I will do whatever the committee would like to do.

: I will too.

: Let me just put it in the form of a motion. We agree to meet at 9 o'clock in the morning.

: Well, let's make it 45.

HARRIS : I move that we recess until 9 in the morning.

PATMAN : I have a substitute in the morning that we recess for 45 minutes.

: --okay, come back about 7:15.

: Yes, that would be all right.

CHAIRMAN : Senator Harris moves that the Committee stand recess until 9 a.m. tomorrow morning, and Senator Patman makes a substitute motion that the Committee stand recess until 7:15 this evening. A shorter time comes first, so we vote on Senator Patman's motion to come back at 7:15 this evening. We like a show of hands. All in favor of coming back at 7:15--recess until 7:15. All against. (Laughter)

: All the law partners vote together there.

CHAIRMAN

: We will stand recess until 7:15.

AFTER RECESS:

CHAIRMAN : Mr. Snead.

SNEAD : Mr. Chairman, if I may get--go back to where I started to in the beginning.

PATMAN : Let me ask you. May I ask a question?

SNEAD : Yes, sir.

PATMAN : In those regulations where it said in health and accident insurance policies that you had guaranteed renewable where you could raise the rates, and what was the other term?

SNEAD : Non-cancelable, or--

PATMAN : Non-cancelable which does not raise the rates?

SNEAD : Right, sir.

PATMAN : When were those regulations adopted?

SNEAD : They had been--the particular ones that I have passed out were adopted at the end of 1971. There have been other regulatory rules and regulations used by the Board and then there have been some just "bootstraps" (?) saying I don't care what, you know, this just is bad and you are going to stop it.

PATMAN : Well, I am glad to hear that because we hear a lot of complaints about the health and accident field. I don't know-- (inaudible due to overlapping conversations) --carried

by those regulations--

SNEAD : And this is what I will get into--the evolution of how this thing has developed and how the regulations have taken place.

Let me go back to the beginning of this.

PATMAN : Well, I don't want to detract from your testimony about this bill.

SNEAD : The original act was 2121 which was the discriminatory statute. That is, you treat everybody alike and you do not misrepresent and that sort of thing. Originally developed from the New York law out of what was called the Armstrong Investigation then was adopted initially in the State of Texas in 1909, following exactly the New York law, and everything rocked along so far as regulation was concerned until in the 1940s. At that point, and let me say this, the relevancy of all this is the reference in this particular act of the Federal Trade Commission, and what we will do is to show this evolution to you of the status of the law and tie back into the Federal Trade Commission which this bill said if you comply with the Federal Trade Commission, then you have no problem. Now up until the early 1940s insurance was deemed to be intrastate commerce and subject to the regulation of the state. In the early 1940s, I believe '43 or '44, the United States Supreme Court in the Southeast Underwriter's Case held that insurance was a matter of interstate commerce and subject to the regulation of the Federal Government and that the states do not have authority to regulate.

PATMAN : Let me ask a question. Do these other states that have consumer protection acts-- do they purport to regulate insurance matters too?

SNEAD : And all I have gone at is an attempt--

PATMAN : Do they exclude--

SNEAD : --to find, and I have not tried to check state--

PATMAN : Do you know of any that exclude--

SNEAD : -- in a model act as I understand a model act as proposed. It exempted--

PATMAN : What is a model act? I don't even know what that is said is true.

SNEAD : --what I think--what I hope to be and I do not represent this to be--but this is what I have been informed to be--

PATMAN : You mean the model consumer protection act?

SNEAD : Yes, sir, the model consumer protection act.

PATMAN : Well, my question though--do you know of any state that exempts insurance from its provisions?

SNEAD : Not specifically to answer you.

PATMAN : That's all.

SNEAD : I do say that the model act exempts, and may I read it--"Actions or transactions permitted under laws administered by the state public service commission or other regulatory body or officer acting under statutory authority of this state or the United States for the state fair trade law," which is my understanding of what is the model act and then it also exempts the matter of _____. Now this act goes to the question of the Federal Trade Commission. It exempts the Federal Trade Commission regulation and what I want to demonstrate to the committee is how this relates to the State of Texas. Now when the Southeast Underwriter Case was decided by the Supreme Court of the United States, it said that insurance was interstate commerce and solely regulated by the federal government and at that point there was no federal regulation. It was a complete break and Public Law 15 was then adopted by Congress and I think unanimously by Congress which said that the several states are granted the right to regulate is the matter of insurance to set taxes, anti-trust laws and all matter of regulation, and at that point the National Association of Insurance Commissioners--

PATMAN : Pardon me, but what year was that?

SNEAD : That was in, I believe, 1944 that the Public Law 15 was adopted by Congress immediately in or right at the end of World War II. The NAIC, the National Association of Insurance

Commissioners then came in with model laws urging each of the states to adopt these model laws and regulations. And at the end of that and as a result of that in 1951 the State of Texas adopted what is now Article 2121 of the Insurance Code which deals with the matter of advertising, fair trade practices, and all that goes with it. And then, as inevitably follows, there was litigation between the Federal Trade Commission saying, no, the states didn't have that authority in the matter of advertising and so in 1957 in the American Hospital of the Life Insurance Case v. Federal Trade Commission in the 5th Circuit opinion by that court, that court found as a matter of fact--and may I read from here the next to the last concluding paragraph-- "The commissioner examiner found that each of the states in which the petitioners did business except Mississippi had enacted laws for the regulation of false and deceptive advertising." Mississippi enacted such a law while the matter was pending before the commission. This is not controverted.

PATMAN : What is the date of that suit?

SNEAD : The date of that decision was April 9, 1957.

PATMAN : All right, when did the Commission adopt these regulations that you and I are talking about on accident and health here?

SNEAD : You are talking about the last ones or the ones in between.

PATMAN : The last ones.

SNEAD : The last ones which were brought on up to date which are stronger--

PATMAN : And they are the most meaningful of all, aren't they?

SNEAD : They are the most meaningful and they are stronger than the rules and regulations of the Federal Trade Commission in my opinion.

PATMAN : In 1971.

SNEAD : They were adopted in 1971.

PATMAN : From 1957 to 1971--

SNEAD : There were various and sundry rules and regulations that were adopted.

PATMAN : And that's why we had all those complaints, I guess.

SNEAD : And then from that and the evolution which is followed in 1971 you have the regulations before you which are now the ones that are enforced. You have set up a separate department.

Now the bill before you -- the bill before you says there is an exemption if you go with the Federal Trade Commission. In other words, this is a compliance with the provisions of this act if you are with the Federal Trade Commission.

PATMAN : Where is this exemption in here now? You are talking about on 75?

SNEAD : Yes, sir. And that is was General Hill's testimony to that effect.

PATMAN : Okay. I didn't hear all of that.

: But what you are saying is that this bill is designed not to conflict with the Federal Trade Commission or any other state agency?

SNEAD : And what I am saying is that in the State of Texas, the federal government by Public Law 15 as supported by the finding of the Fifth Circuit with writ of certiorari denied by the United States Supreme Court, it is said that Texas does regulate that Texas does have the authority to do it. Now, if a domestic company in its advertising practices if a matter goes before the Federal Trade Commission, it is then sent by the Federal Trade Commission to the State Board of Insurance, and there is in effect commonalty or cooperation between the two and they go back and forth. So what you have is, the State Board of Insurance in this evolution of the process between will the federal government control the decision by Congress that the states will control. You have ceded bound to the State of Texas the same regulation as the Federal Trade Commission so far as the Insurance Department is

concerned. Now we say and we recognize in this bill the Federal Trade Commission. We are saying that the State Board of Insurance is now regulated, is now doing more than is being done by the Federal Trade Commission in the overall field of insurance regulation. This is the body and the authority that is vested. So what we have is tying it together. We have the expertise. We have the examiners that go out and check. We have the fieldmen who go out on every single complaint to find out what the public is saying. We have a bunch of actuaries. Now I frequently can't understand and I will admit what they are saying, but these are the mathematicians at the Department. And you put it all together and you have the regulation. Now the effect of this bill is that if you are going to make in the Attorney General's Office the same determination, come up with the same, this is an executive body, both the Attorney General and the State Board of Insurance, and when it makes fact findings, it is doing so in a judicial capacity. When it adopts rules, it is an executive body exercising a legislative function. Now, by the amendment of Senator Gammage, you have attempted to tie together here saying that it cannot--the Attorney General in his legislative function cannot come in and say, we legislate contrary to what the State Board of Insurance does, but the fact finding or the judicial function you have not tied together. We--

PATMAN : Let me ask a question at that point if I may. Doesn't that just afford the public a double layer of protection?

SNEAD : No, sir, I don't think so.

PATMAN : I mean it affords him another opportunity for _____ (inaudible).

SNEAD : But, Senator, that is not the point that General Hill said.

PATMAN : Well, I don't know whether it is what he said, but doesn't it do that?

SNEAD : No, sir, I do not think so because it does

not afford to the public a double layer of protection when there is the possibility of conflict between the two.

PATMAN : Well the only conflict would be resolved in favor of the person that's protected, isn't that right?

SNEAD : Well, let me say this.

PATMAN : His warranty would be stronger than the other?

SNEAD : Let me go back to the example I gave earlier that I argued with Mr. Doggett. Let's assume you and I have a lawsuit. We go up to the courthouse and try it. We try it in the 53rd District Court and you win the jury verdict. We try it in the 98th a jury verdict and I win. Now who gets the judgment? Now this is what we are up against. Regulate us? Yes. You know, if we sin, then the way of the transgressor ought to be hard, but somewhere there ought to be the representative of the state, the body, politic, that is regulating the industry, not the joint. Now this is fine-- as I pointed out in what I believed to be the model act. It exempted other state agencies. What you are getting at here, the thrust, the consumer protection, as was testified to during the special sessions by the Dean of--the former Dean, Mr. Kimble, Preston Kimble, of the Wisconsin Law School, the thrust of consumer is to get to what is paid by the individual-- that it is a proper rate or a proper price and that he gets what is represented to him that he gets. And that's what we want. And that's what you want. Now the--

PATMAN : Is there anything in this bill that accomplishes that?

SNEAD : Yes, sir, to the extent of this--that it divests double jurisdiction, the very thing that General Hill said he wanted in the bill, that he did not want any conflict between the state and the federal government and therefore he said we follow the Federal Trade Commission. Now, so far as insurance regulation in the State of Texas is concerned by reason of Public Law 15 acceding to the states the State Board of Insurance performs the function of the Federal Trade Commission. It regulates and, as I say, in my opinion, it is more stringent regulation as of the last adopted rules than

is the Federal Trade Commission. So all we are saying it --tie it together, put us under somebody, but let us know where to go, what to do and how to do it so that we are not caught between the two. If you want to put us in the State Board of Insurance and say, let the Commissioner make the determination, or the Board; if there is fraud that there is a refund of the premium, or whatever, the procedure before the administrative body is far swifter, and far better than it is to the courthouse.

PATMAN : Let me ask you this. Are insurance companies subject to FCC?

SNEAD : Yes, sir. Wherever they are within the issuance of a public--now, by mutual assessment they are not subject to it.

PATMAN : Well, that's what happened under the National Bankers Life.

SNEAD : I am not too familiar with it. I understand that's what was done was.

PATMAN : And you are subject to a county attorney's _____ of action against you for some sort of fraud, I suppose?

SNEAD : Yes, sir. But you see in the FCC it is a matter of National Bankers in the sale of stock. It was not a determination. It was out (?) of the determination that was made by the State Securities Board and then reversed by the FCC.

PATMAN : But that was the FCC and the FTC. They were both possibly involved or could have been.

SNEAD : I am not conversing with you. I do not know of --

PATMAN : You are not subject to this one regulatory agency at this time, are you?

SNEAD : Yes, sir.

PATMAN : You mean the federal government has nothing to do with these practices?

SNEAD : So far as income tax returns, they are concerned. But so far as advertising--

PATMAN : What about the FCC?

SNEAD : No, sir, because if there is no one in

the people that I represent that are engaged in the sale of stock in interstate commerce.

PATMAN : How about the Federal Trade Commission?

SNEAD : No, sir, which causes the fact that under Public Law 15, the federal government, the Congress of the United States, has ceded to the State of Texas the right to regulate the advertisement of insurance companies and has ceded it to the State Board of Insurance as the entire development of the court from 1909 through the latest rules adopted in 1971--the course of the history of the industry, has placed the regulation of the insurance industry in total scope into the State Board of Insurance. Now we don't object if we need to give to the State Board of Insurance the power itself to _____ administration. You don't do it. (?)

PATMAN : Well, in a nutshell, you are opposed to the bill because it adds another _____ of regulation.

SNEAD : I am opposed to the bill from the standpoint that there is a hiatus.

PATMAN : A hiatus?

SNEAD : A hiatus of regulation. You have got dual regulation--

PATMAN : Well, that's not a hiatus, is it?

SNEAD : --and the thrust of the consumer--

PATMAN : A hiatus is a "gap", isn't it?

SNEAD : Well, which one would control? The basic thing is if it is fundamental and again, General Hill said what the consumer approach is--tie it down into one area, one control where the public knows what to do, and that is exactly what he was arguing and the thrust and the purpose of this bill was to tie it down to one place. Now, I dare say that he will probably get some insurance complaints, but the public today, I'll bet you that 99 percent of all of the complaints that come in on the matter of insurance into the state agency go to the State Board of Insurance because that is where they look to. And it is this--

PATMAN : A lot of them come to my office.

SNEAD : Yes, sir. I understand that.

CLOWER (?) : You will agree that we can all send them to

the Attorney General in effect?

CHAIRMAN : Senator Gammage has question.

GAMMAGE : Mr. Snead, you know, we have gotten off into the internal (?) imaginations of the insurance industry and all sorts of policy questions and what have you. Then the point of fact, this act, this bill deals with deceptive trade practices primarily in the enforcement area. If we want to talk about the dual rule-making, we can get off into that, but we have already avoided conflicts there, but primarily in the enforcement area--it does not deal with all these internal workings and internal machinery of the industry. Under your proposition of prohibition that we followed--precedents that you want to set here--prohibition on overlapping functions, or any kind of a dual function here would exempt all sorts of industry, wouldn't it?

SNEAD : No, sir. No. sir.

GAMMAGE : What about the Comptroller, the _____
_____ (inaudible due to overlapping conversations)

SNEAD : You are changing the precedent. You are making the judgment to change the precedent. The precedent is now with the State Board of Insurance. That's what the law says now. You are taking and moving the State Board of--the insurance regulations from this particular provision--

GAMMAGE : We are not removing it.

SNEAD : You are changing families (?). You are taking the provision of the regulation now and you are the one that--or the bill that is before us is what amends the law.

GAMMAGE : I agree--

SNEAD : The law says now--

GAMMAGE : I am talking about the exemption here that you are trying to include under this act and under this new act, not all presently on the books, but under this bill right here.

SNEAD : But, Senator, your question related to what is the precedence, and the precedence today is that the law says it will be regulated by the State Board of Insurance.

GAMMAGE : I am not arguing with that, but what I am talking about if we are going to have a strong and effective

deceptive trade practices act, if we are going to--is Senator Patman going to add another layer of protection for the public. If we allow the insurance industry's exemption to ride, then why not one for the automobile industry which is also regulated by another area, why not one for the whole retail industry which is supporting this bill and also under the regulation of the Consumer Credit Commission, why not retail--they also take their sales taxes through the Comptrollers Office. You know, I just don't understand it.

SNEAD : Because, Senator, this is the only industry-- this is the only one of all of them in the state that the Congress of the United States has said to the state, you do it and created an agency to do it, and there has been that regulation. The power is there.

GAMMAGE : Then no other jurisdiction has dual regulation too?

SNEAD : So far as I know there is not. Now I have not gone out and checked. I am going to. All I know is that what I have checked so far as the model act as I understand it to be-- it deals with and exempts where there is this kind of regulation.

: Can I be recognized on that point just for an example. I have two model acts here in front of me. This model consumer protection act says that actions or transactions permitted under laws administered by the state public service commission or other regulatory bodies or officer acting under statutory authority of this state or the United States. What that says that the other agencies can go ahead and regulate and that this act is not going to change their ability to regulate.

SNEAD : I don't read it that way, Senator. I read it as saying that those acts which are regulated are then exempt from this act.

: It doesn't say that.

SNEAD : It's exactly in there where you exempt the newspapers. It is the same thing. It's the same specific exemption.

: The next paragraph exempts the newspaper. We have adopted the next paragraph. This amendment that has been taken and that we have adopted puts in the first section of the

regulatory act. It exempts state agencies.

SNEAD : Senator, the only thing is that on the copy I have the heading of it is "Exemptions."

: Right.

SNEAD : And then it says, "Nothing in this act shall apply to" and all we are saying is--

: All right, what you can do on that-- Section 1, you can lump all those together and what that says is "state agencies" and no place does it say insurance industry or any particular industry.

SNEAD : It is one of those industries.

: No, this applies only to state agencies.

We did it.

SNEAD : That is what I am talking about--transactions which are approved by or actions--actions or transactions permitted under laws administered by the State Public Service Commission or other regulatory bodies or officers acting under statutory authority of this state or the United States. Now the exemption which has been in this bill 75--Senate Bill 75--takes out the part about other state agencies and limits it on the Federal Trade Commission.

: The part says "issued by other state agencies, boards, or commissions."

SNEAD : Senator, you are going back to Senator Gammage's amendment which is an amendment dealing and tying back together only in the legislative function of the executive body.

: Okay, let's go to that--

SNEAD : Now the judicial regulation is otherwise.

: Let's take that point for a moment. Are you presently saying that in its judicial function that the Insurance Commission has the last word on whether or not something is a deceptive trade practice presently under the law as it is today.

SNEAD : It has the--the aggrieved party has a right of appeal.

: Can they file a lawsuit ever?

SNEAD : Can they appeal to the court?

: Yeah. Can they ever file a lawsuit--
(inaudible due to overlapping conversations)

SNEAD : In my opinion they would have a right
to appeal from the--(Inaudible due to overlapping conversations)

: Is it not possible that under common law
action for fraud right now, the judicial function in determining
what would be a deceptive trade practices does not wholly lie
within the jurisdiction of the Insurance Commission.

SNEAD : There is no question that if an aggrieved
person has a cause and he has a claim there.

: Well, let's go to the present bill as it
is. The present bill sets out a procedure where they can adopt
the rules, not find facts, adopt the rules.

SNEAD : And it also finds the fact. This bill--this
bill--

: The Attorney General goes to the court and the
court is the one that finds the facts.

SNEAD : No, sir. Because he goes in and he makes
the determination before he goes into court.

: There is a detailed provision in here for
where he can adopt rules--additional rules-- to determine whether
or not something is a deceptive trade practice. Isn't that correct?

SNEAD : That is correct.

: Okay, then. After he has adopted a
deceptive trade practice, the Attorney General doesn't sue a _____
on his own motion, suddenly get a judgment against somebody for
violating that rule. He has to go to court.

SNEAD : What he does is to deal in the area of
17.46 with these descriptive phrases.

: Right.

SNEAD : All right. Let's go to this. The term false,
misleading, or deceptive act or practices included but is not limited
to be false. Causing confusion or misunderstanding as to the sources,
sponsorship, approval or certification of this should bar services.(?)

Now the State Board of Insurance can make one finding under this and the Attorney General can make another.

: But what does the Attorney General do when he makes his finding?

SNEAD : He then goes into court and files a suit.

: Presently under the law, cannot an individual make the same decision and go into court and file a lawsuit? Then what is the dif--the court can still find whatever they want to find.

SNEAD : Because of the fact of the _____ between the activities of the State of Texas on the one hand and the individual on the other, and the determination in advance of the Attorney General before he brings that action.

: The point that I am trying to make is that presently under the law what you are complaining about that you say what the bill will do already is a possibility under the present law?

SNEAD : No, sir. Again, I just haven't made myself clear to you. What we are saying is, one or the other regulate us, Senator. Either put us under the Attorney General and let him hire the actuaries, him hire the auditors, everybody go out and do it and let him have the whole authority, or put us over at the State Board of Insurance. But don't put us under dual regulation. That's all we are asking.

: All this bill does is just adds another cause of action or another lawsuit, type of lawsuit, and the person making the ultimate judicial determination is going to be the same, either under this law, this bill we are considering now, or under our present law, and it is going to be a court making a judicial determination.

SNEAD : Senator, I deeply respect your opinion of the bill and I hope that you will respect my sincere opinion to the contrary, but that is not the scope and the limit of this bill.

GAMMAGE : What the bill does is put you under the deceptive trade practices act along with every other commercial industry.

SNEAD : Senator Gammage, I did --

GAMMAGE : --and it gives the Attorney General enforcement power insofar as that act is concerned. It does not touch on the powers already residing in the Insurance Commission.

SNEAD : Senator, there is no more way that the bill here is weak compared to what the State Board of Insurance under Article 2121 defines, sets out what are the bad practices, everything that is bad, what the rules and regulations that you have before you this bill is weak. There is more regulation in the state than there is in this bill. But how can we determine--

GAMMAGE : You haven't been speaking to deceptive trade practices though.

SNEAD : Then I apologize to do it. Let me point out to you the provisions of Article 2121, and it starts out--"Unfair competition and Unfair Practices. (Mind you this is the model act which was adopted originally in '51. It was amended again in 1957, and it was amended again in 1969 after a long study of which--a committee of which Senator Blanchard was chairman)

GAMMAGE (?) : Let me interject one thing right here. Under that act, does the consumer have any remedy other than the common law remedy where he can recover only a specific amount of his damages for a deceptive trade practice. Can he recover his attorney's fees for a deceptive trade practice?

SNEAD : I do not think that he can do it at that level. He can if there is an unfair trade practice and a class action suit of fraud (?) he can recover attorney's fees--

: Deceptive trade practices?

SNEAD : Yes, sir. Now whether or not he has--

: I don't believe it is the same way, sir.

SNEAD : Well, let me say this. I've paid them (inaudible due to noise in tape)--and I settled a lawsuit in Harris County rather than to go to wire on it and we have sure paid the attorney's fees.

: Can you proceed individually?

SNEAD

: Yes, sir.

: And recover his attorney's fees under--

(inaudible due to overlapping conversations)

SNEAD

: What he does always, Senator, is he files suit under the terms of the policy. The deceptiveness does not come about until a claim is given. And then he files suit on the policy and Article 362 provide for the recovery of attorney's fees and he then brings an action to reform the contract to comply with what was the misrepresentation. So recovers under the contract and collects attorney's fees.

CHAIRMAN

: If I may interrupt, I think the author wants to make a comment.

: Mr. Chairman, I really do. Bob, I have a very high regard for you individually and professionally, but Article 362 is limited to claims of health and accident and life insurance policies for a claim. You must first make your written claim to the company. If it is denied, then 30 days later you have the right to file a lawsuit. If the jury finds you are entitled to collect your \$50.22, or whatever it is, the court can also assess 12 percent penalty interest and attorney's fees. That has to do with claims. It has nothing to do with deceptive trade practice, does it?

SNEAD

: No. Let me say this. What I was saying to Senator Gammage was that this does not arise in my area now--speaking about my people that I am representing, we don't have anything ever come up unless a claim is denied as to deceptive practice.

: (Inaudible)

SNEAD

: No, wait a minute, Senator. What I am saying is, we don't have any deceptive practice problems ever arise as far as our policyholders until that policyholder files a claim and that claim is denied. Now when that is done, then is where a suit is brought on a misrepresentation to reformation of the contract and an action brought and asking for attorney's fees.

GAMMAGE

: Can you show me one case in the books

anywhere in Texas where there has been a deceptive advertising claim filed under Article 3.62?

SNEAD : Now, I don't think--I don't think I am with you. Let me say this. You have a claimant who as long as he doesn't have any claim against the company, he is not going to assert misrepresentation.

: Get hurt or if he doesn't die.

SNEAD : Then when he dies--when he comes in and he files that claim, what does he do? And it is denied. He then comes in and says, "This policy was misrepresented."

: Oh, he says, I have a claim under that policy.

SNEAD : Right.

: I got hurt. My hospital bill was \$126. Under the terms of this policy I was supposed to get \$86 of that. They have refused to pay me my \$86. I asked for \$86 and I asked the court to assess 12 percent penalty and interest and my attorney's fees.

SNEAD : And what do you do when they deny liability?

: I prove that he had \$126 hospital bill, that under the terms of the policy they are supposed to pay him \$86, and then by operation of law, the court can assess 12 percent penalty and interest and attorney's fees. It has nothing to do with advertising whatsoever.

SNEAD : All right, and then if there was a misrepresentation, then the way it is handled today is, you come in and file for reformation of that policy because here is a piece of advertising that says this is _____.

: No I am suing for money damages under 3.62 and that's all I am suing for.

SNEAD : Well, let me say this my people have paid a whole lot--if you are correct, Senator, my people have paid attorney's fees that they should not have paid. And I don't mind any way shape, form or fashion provided in the law that the State Board of Insurance can put attorney's fees on us, or that you can add collect attorney's fees in that sort of a situation.

GAMMAGE : I tried the first medical payment case that ever went up under 3.62 and it was not stipulated.

SNEAD : But we are happy to have it. Just-- in other words if you want to say and add on to this bill, you say that the State Board of Insurance can levy fines against these people for any sort of this practice that is set out in the law completely in much more detail and much more regulation than is this act and if you want to say that if there is _____ deceptive practice, then there is a right of attorney's fees, that's fine. All we are saying in this complicated business where the federal government has said to the state, you regulate it. And you recognize in this bill the Federal Trade Commission. You recognize _____ regulations that it had and the arm that has been adopted in this state to exercise that function is the State Board of Insurance. So, give them the authority and put it over there and we will not object. What we object to is--

PATMAN : Pardon me, but they have all the authority they have asked for, haven't they? Isn't that right? Isn't that right, Mr. Cotton? You all have all the authority you've asked for?

COTTON : For one exception.

PATMAN : What's that?

COTTON : A year ago--one bill last year on election machines.

PATMAN : Well, so far as you know, Bob, that's true, isn't it? They have got all the authority they have asked for?

SNEAD : I am not conversant with that because I am not privy to what they are--

PATMAN : Go ahead. I am sorry to interrupt you. Go ahead with your conclusion.

GAMMAGE (?) : One more point before you draw your conclusion and that is, under 3.62 you were talking about wrongful failure to pay a claim under the contract. We are not talking about misrepresentations made as an inducement to purchase or to conclude that contract. We are not talking about advertising practices, are we? We are talking about the terms of the contract-- it may be practice and wrongful failure to pay a claim in the contract.

SNEAD : Here is what the sophisticated lawyer that comes in now. If there is any smidgen of misrepresentation, any question of false advertising, misrepresentation, the standard approach that is made now in the courts--and let me say this--we haven't had hardly any in ours, but the cases that I have read and I have seen indicates the smart lawyer when he comes in and he says, I have a claim. This policy was sold on a misrepresentation and here it is. So I ask the court to reform the contract and simultaneously pay the claim. And then he gets attorney's fees on it. So the net effect is--that's how you do it, and you do pay attorney's fees.

: 3.62 in your opinion does speak to deceptive representations--representations that are made as an inducement to purchase that contract?

SNEAD : It does in a practical effect where you have the misrepresentation because if I misrepresented it, the court is going to reform the policy contract to the misrepresentation.

: That is the misrepresentation as to the definition or the meaning of terms in the contract?

SNEAD : That is correct. If I gave--

: But outside the representations made as an inducement aren't covered, are they?

SNEAD : Let me give you an example of a health insurance policy. If the representation was made ending that the advertisement was made that there was no waiting period or there was no pre-existing conditions, and the policy was issued and there was a pre-existing condition, then the claimant comes in court, says this is my policy, this would be the ad that I bought upon or the representation that I bought upon, reform the contract, give me my claim and attorney's fees and 12 percent penalty. And that's what the courts are doing.

: Now, one step farther. In the Deceptive Trade Practices Act that's presently on the books as it was enacted in 1967, was there any exemption for insurance?

SNEAD : Yes, sir.

: In 1967? From 1967 to 1969 was not the insurance industry included? And in 1969 you got your exemption?

Isn't that correct?

SNEAD : I can't answer that.

: I believe if you checked it out that you would find that's correct. The City of Dallas today, that's the insurance capitol of Texas, has a city ordinance, does it not, on deceptive trade practices? It does not give any exemptions to insurance even there.

SNEAD : I am not conversant with it.

: I think if you will check, you will find out that it is correct.

I just have one more point-- Going back to this uniform bill--if we accepted the interpretation that you make of the exemption which is actions or transactions permitted under a _____ (inaudible due to cough in microphone) by the state, and we accept your interpretation, would that exempt the insurance industry?

SNEAD : I think this--now, I would like to see it clarified because I think it ought to be cleared. All I am saying is, and urging, is that one place a--

: In the beginning--okay, let me finish--

SNEAD : (Inaudible due to overlapping conversations) don't _____ what Senator Gammage has suggested by his amendment in the rule-making power. Then tie it down also in the fact-making and judicial functions.

: Even if we adopted this language that you say here--exempts the insurance industry--any control--you in fact would still be unsubject (?) to this act because by your own testimony, your administrator or whatever he is does not approve advertisement as being acceptable. He says at the present time this is not deceptive. Anything can change.

SNEAD : Wait a minute. I didn't understand your question, Senator.

: You were testifying a while ago about how strict the regulation was--that the Insurance Commission puts on to the insurance companies having to do with advertising. They have to submit it in advance--

SNEAD : That is not required.

: All right, if they submit it in advance the Insurance Commission considers it, and then they don't even give a stamp of approval to it.

SNEAD : They say it is--we accept it as of now subject to if you change.

: That would come within this exemption, even the way you read it because that is not approved action. That's the conditional approval.

SNEAD : Senator, somewhere, somewhere anybody is entitled to a determination.

: And that's the point I want to make. The only place where it is now under present law where it will be in the event that we adopt Senate Bill 75 is in the courts.

SNEAD : Well, I think we are a long way apart because if that's it, then we--then the Federal Trade Commission has the whole regulation because we are in violation of Public Law 15. It is not only that the state seeks to regulate in order to maintain the continuation of state regulation, but the state must actually operate. In other words, if the state does not regulate, you can pass a dozen laws. If the state does not operate, then the federal government is regulating. Now, the point is that we are in a great problem of controversy and quagmire as to when is the state going to continue or when is the federal? And it is a very touch and go thing. We like and we propose state regulation, but the federal regulation is right upon us. Now, either we ought to be under the Federal Trade Commission, and this was our controversy this was the litigation with the Federal Trade Commission and the Fifth Circuit held that the state does do it. We ought to either be under the Federal Trade Commission. We ought to either be under the State Board of Insurance or the Attorney General. And all we ask, and all we urge you, puts us one place or the other. Either give us to the State Board of Insurance. If it needs to assess additional fines of \$2,000 to \$10,000 instead of \$50 to \$500 as Article 2121 provides, then raise the limit. If the attorney's fee provision as Senator Mauzy is pointing out needs to be expanded, then expand it.

Just put us one place or the other. This is all we are asking.

CHAIRMAN : Thank you.

ANDUJAR : I shouldn't say anything because you are lawyers and you are deep into this, but this says in plain English--

CHAIRMAN : The Chairman is also not a lawyer--(Laughter)--So you ask it

ANDUJAR : Sir, isn't the Insurance Commission a regulatory body of the state?

SNEAD : Yes, ma'm. I asked them up there to get the information as to how many companies have been dealt with, and since Mr. Odom has been in up there as head of this Department, 26 formal hearings have been held or scheduled as unfair trade practices for misleading or deceptive trade practices. Twenty-three cease and desist orders have resulted from these hearings. Most of these companies or agents have been required to submit future advertising for review by this Department until it is felt that voluntary achievement will be accomplished. Two of the companies involved are still submitting there advertising for review prior to--approximately 50 companies have submitted their advertising for review prior to its use with any necessary changes being made. The above does not include the review of advertising rules used in connection with participating life insurance policies. Such review resulted in approximately 45 such forms being withdrawn or disapproved. This is a continuing process that is accomplished in connection with the submission of any new participating life insurance policies which may appear to lend themselves to misrepresentation.

CHAIRMAN : (Inaudible)

: Mr. Snead, how many people got their money back?

SNEAD : I would say this. Wherever, and again, wherever there is an arraignment (?) with the Department's findings --I don't know what they do to other people's findings--but I know what they do to my clients--and we if we've got a misrepresentation the first thing they do is say, all right, are you going to make everybody hold (?).

: What in fact that would be _____?

SNEAD : I can't answer that because I am not privy to--on the thing at all. Frequently what's done is to write everybody a letter--to answer--to inform them of where--this is one I did--where nobody thought that the error was in there and the question was raised by a man in Houston and there were ten thousand letters written to the policyholders of that company and they didn't all receive the advertisement whatsoever pointing out exactly what was the question that had been raised by one policyholder--one--and, then in turn saying, this--so there will be no question, this is it. And anybody that wrote back and said, I want my money back was paid their money back. And every policyholder of that company was sent a letter back to that effect because one policyholder filed a suit. And I assure you that that Houston attorney was paid an attorney's fee.

: The law was here in compliance.

SNEAD : And everybody was just as innocent as they could be and the first thing as soon as it developed and as soon as we found out about it, we went to the State Board of Insurance.

: Do you think the situation would be any different in this situation if this bill was enacted?

SNEAD : Yes, sir. Because I think there can be _____ (inaudible due to overlapping conversations).

: Do you think where there is good faith action or good faith acts or omission that are errors--faith in error and bona fide error and there is nobody trying to shaft anybody else, do you really think that this thing is going to affect you topside or bottomside?

SNEAD : Yes, sir, where there is the dual regulation. This is exactly the problem that occurred between the Federal Trade Commission, Public Law 15, and the State of Texas. Who is to control?

: What was the situation during that two-year period when you were not exempted?

SNEAD : I do not know, and I apologize, but I do not believe that that has been in there. So far as I know we have all tried to comply just as the best we can.

: I think we had a thriving insurance industry during that two-year period. Nobody was disqualified (?)--
(End of Side 2 of Tape 2)

TESTIMONY ON S. B. 75 BEFORE THE SENATE COMMITTEE ON HUMAN RESOURCES
SENATOR BROOKS, CHAIRMAN
February 14, 1973

Tape 3, Side 1

(Continuation of testimony of Mr. Robert Snead)--where one body or the other regulates, and I think that is all that the industry is asking for.

: You mean that if we, say drew him an amendment or amended the insurance code to the effect that in situations involving deceptive trade practices or any kind of misrepresentation of fraud that the enforcement jurisdiction, the rule-making jurisdiction, and the fact finding jurisdiction, all the functions that you have spoken of here today, were placed in the Attorney General's Office you would be happy?

SNEAD : I think it ought to be the other way, but I, you know, one or the other--one or the other. If you want it this way--

: What if we drew a bill exactly like this and amended it to the insurance code?

SNEAD : Well, take the insurance code and put it in here. You'd have to do that. I don't care--which ever way you want to go, but, please, it is so detailed.

: I see your colleague having a fit back there--(inaudible due to noise and confusion)--(Laughter)

SNEAD : I think Mr. Cotton jumped on him today and so he wants this under the Attorney General. (Laughter)

: How is there going to be any conflict under this amendment that we have adopted. It plainly says the regulations issued by the consumer protection division under this sub-chapter may not be in conflict with rules or regulations issued by another state agency. Well, here is what the Attorney General does. If he wants to issue a regulation, he publishes notice and I assume that is a procedure they go through and he can issue some regulation and say, this is a deceptive trade practice act. He is totally prohibited from accepting any of those regulations of being in conflict with any rule or regulation in the Insurance Commission.

SNEAD : The suggestion I would make--you have the amendment _____ (inaudible due to coughing into the microphone)

I would suggest the wording of it leading with the legislative function--the regulations issued by the consumer protection division under this sub-chapter may not duplicate or be in conflict with rules or regulations issued by another state agency, board, or commission pursuant to constitutional or statutory--to their constitutional or statutory authority. Nothing in this sub-chapter prohibits or limits a state agency, board or commission of Texas from issuing, implementing, and enforcing rules and regulations pursuant to the authority vested in the agency, boards, or commission by statute or the constitution. Then I would think that we should add to this in another amendment that the fact finding of the board or the commission and give the Attorney General the right to go, to deal with that they can _____ (inaudible due to noise and confusion in microphone)--of fact that's applicable to whether or not the Attorney General files a suit.

: In other words you are going to say whether or not the Attorney General can file a suit. That is the only fact finding he makes.

SNEAD : No, sir. But what I am saying is, Senator, may we change places a minute. Let me sit over there and you get on the hot seat here.

: I apologize for _____.

SNEAD : Let's assume it's your client, and you are dealing with _____, and you come up with a piece of advertising--your client does and you say, okay, now, the client says, I want you to advise me about this about what to do. So we go down to the State Board of Insurance and we go into see Mr. Odom who is in charge of that Department and we sit down and he says, you change this and you change this and you change that. And we do it, and then we go back and we change form from the brown lines to the final form and he says, okay. Then we go issue it. And then the Attorney General files a lawsuit and says, that's false, deceptive and misleading advertising.

: Alleges--alleges that's false.

SNEAD : Then he files a lawsuit--

: But he alleges--the court is the one that

says. Presently under present law the court also can say the very same thing, can't they?

SNEAD : That is true, but what you have here is the Attorney General of the State, the State of Texas is paying the cost of litigation. The State of Texas. If you sit down with the normal individual today and discuss it, he is not going to say you are a thief or what have you. He will say, come with me down to the State Board of Insurance. Let's talk about it. And this is how you discuss it. But where the Attorney General is using all of the funds of the state, then if the state is paying for the litigation, everybody is paying for their--for the litigation--the people of Texas are paying for the litigation to controvert or contest what the other arm of the state has said is all right. Now, this is our problem. In other words the state pays Mr. Cotton, and he says, it's good. And the state pays the Attorney General and he says, it's bad. Now somewhere it has got to be ironed out. That is all we are asking for.

: (Inaudible)--I didn't mean to get you on the hot seat.

SNEAD : I thank you very much and I apologize for the time.

PATMAN : Mr. Chairman, the rules provide that the witnesses submit written testimony. May we ask those witnesses who are coming up if they have written testimony here today? How about you, Will, do you have it?

DAVIS : (Inaudible) No. (?)

PATMAN : Are you familiar with the Senate rule that requires that?

DAVIS : No, sir, I am not.

CHAIRMAN : I think if you take it to the rule--you require a motion (?).

PATMAN : Well, that's fine. How about the other gentleman. Has he got written testimony?

: I have not. I was not aware of the rule.

PATMAN : Well, I was just wondering how long is it going to take you?

: A whole lot depends upon how many questions I have to answer.

PATMAN : That's right. I mean just without the questions?

: About 20 minutes, 25 minutes.

PATMAN : How about this gentleman?

: I hope about fifteen, ten perhaps--not over fifteen I would think.

CHAIRMAN : That's the only two, Senator, we are all right. Don't let another hour change the rules (?).

PATMAN : Well, that's fine, but--

CHAIRMAN : If you had time before and you do want _____ upon me, I think I would rule--I would simply set the motion--

PATMAN : Well, that's fine--

CHAIRMAN : --to request it and then all witnesses are going to testify on either side of the docket--

PATMAN : Sure.

CHAIRMAN : --would have advanced notice including the _____.

PATMAN : Well, I was wondering. This has already been heard by the subcommittee one time and it seems like--

CHAIRMAN : Senator, none of these witness have been heard from before and it is not the fault of the subcommittee. It has been posted properly--(inaudible due to noise and confusion into the microphone).

PATMAN : Of course, it would help me if we had it in writing, but probably doesn't need to be done for us.

CHAIRMAN : We can say anyone who has a statement in writing, or plans to prepare a statement on it after the hearing, they can submit it to us and we would appreciate it.

PATMAN : What about the members of the State Board of Insurance. Are they going to testify?

CHAIRMAN : They all signed a card, but I understood--

COTTON (?) : We are here to answer any questions that might be asked in regard to the Commissioner.

PATMAN : Fine, thank you.

CHAIRMAN : The Chair calls Will Davis.

DAVIS : Mr. Chairman, by the rule I presume that in registering obviously I might file written testimony as well as the oral testimony--as a matter of fact I don't know how well the lobby knows _____ (barely audible due to open microphones which catch all noise and confusion)--so it might not be a bad idea for _____ (inaudible). (Laughter)

: I think they wrote some of it.

DAVIS : My name is Will Davis and I can assure you, Mr. Chairman and the members of the Committee, that I did not know there was any rule requiring a written presentation of testimony. It has been my pleasure to appear before about ten committees so far this session, and I have never heard of that before.

CHAIRMAN : No, there is no rule requiring written testimony.

PATMAN : It's principle, I believe.

DAVIS : I am an Austin lawyer, who during the legislative session represent my clients part time before the legislature when they have business before these committees. I am appearing here tonight on behalf of two clients--one is the American National Insurance Company in Galveston and the other is the Texas Legal Reserve Officials Association which is a trade association of stock, life, health and accident companies domiciled in Texas.

A little background for some of you who may not be familiar with my background. It was my very distinct pleasure to serve this state as an assistant attorney general in charge of insurance, securities, banking, and the appellate division of that office under two attorney generals. I also served as general counsel to the State Board of Insurance. During this period of time which was in the middle 50s and the late 50s, it was my opportunity to have a great deal to do with drafting and lobbying as a state official or as a state employee. Reform legislation took reform

in 1955 and 1967 with amendments to the Texas Insurance Code. It also was my opportunity to be the counsel for the State of Texas that wrote brief and arguments before the Fifth Circuit of the Case which Mr. Snead referred to earlier known as the American Hospital, Life and National Casualty Company Cases that set the precedent for the adoption of the advertising and trade regulations to a large extent that we now have today in the state. I think I would simply like to summarize part of what Mr. Snead said about the thing this. That to the extent that the United States Congress has allowed and required the insurance industry in this state and the State of Texas to regulate advertising and deceptive trade practices and consistent with the times they have changed their attitude in any way about advertising and deceptive trade practices and as they have changed their mind from time to time, the legislature of this state and the insurance industry of this state have come to the legislature and passed laws changing the advertising and deceptive practices acts relating to insurance to conform with the requirement of the Federal Trade Commission or the United States Congress. Suffice to say, that the Texas insurance industry has consistently, consistently been in step with advertising and deceptive trade practices, regulatory authorities to this very day.

Now, also for some who may not be familiar with it, this is a compilation of the reform legislation or changes in the Texas Insurance Code passed in 1971. A book about this size was passed in 1969. There were 22 Senate bills and 25 House bills passed last session, a total of 47 bills relating to insurance. About that same number was passed in 1969. I simply say that reform didn't start until 1973 in the insurance industry. It started in 1955 and '57, and has been a consistent, evolving process largely with the support of the insurance industry in this state.

There seems to be some hesitancy, or at least some reluctance to provide for a single regulatory agency or a continuation of a single regulatory agency over one area of the public's business. The condition has been, let's say, and the precedent has been that the public's business is better

regulated housed in one regulatory agency whether it be securities, whether it be banks, whether it be savings and loans, whether it be insurance, whether it be consumer practices, whatever it has been, the precedent in this state to date essentially has been that the policing, the regulatory policing of these highly regulated industries have been vested in one regulatory agency.

The Attorney General of Texas under Section 4--Article IV of Section 22 of the Texas Constitution is the state's lawyer. He is the lawyer. Under Article 4399 of the Revised Civil Statutes of Texas and two other statutes found in that general area he again is stated to be the state's lawyer. He is required to represent the state. He is prohibited from representing private parties, either in court or giving them opinions, advising them or otherwise.

This act, this bill, as we read it, does create and does vest in the Office of the Attorney General an administrative function. He ceases to be a lawyer to the extent largely this bill vesting in him administrative power, first, in the legislative delegation of rule-making power. He is granted the authority to promulgate rules and regulations which define and add to the definition of false, misleading, deceptive acts and practices. Those terms are defined in 21 or 20 paragraphs beginning on page 3, 4, and 5. Under Section 21 of that same general section on page 5 and in the rule-making power on page 6 which is Section 17.47, the Attorney General is authorized to add to the list of offenses, add to the list of deceptive trade practices by his own rule-making power new acts, new transactions which he determines in his own wisdom as being violations of this law. My own opinion is for whatever it is worth that that legislative delegation of authority cannot be vested in him or any other regulatory agency. It is contrary to Supreme Court opinions in this state that says that any rule-making power vested in an administrative agency must be within the confines of the standards and the guidelines set out in the regulatory act. And very clearly it turns you on as giving authority not to stay in the confines of the act, but to go beyond it. By adding to the list of deceptive

trade practices he is not confined to promulgating rules and regulations to carry out this act, but to add to the act, to add to the violations set forth in the act. The Supreme court on numerous occasions says that such authority in any administrative agency, not just the Attorney General or anybody else, is too far--it has gone too far. It has gone beyond the standard. It has gone beyond the guidelines and you do not have the power to act as a legislature. You are an administrative agency, and must carry out the act of the legislature as they have promulgated.

It cannot be that type of power, that type of discretion, that type of judgment on his own initiative.

PATMAN : May I ask a question? If we submitted this to the Attorney General, I don't suppose there would be any question about whether or not it would be _____ (Inaudible due to noise cough and confusion in microphone).

DAVIS : Well, Senator, let me say, I am not sure because in all fairness and I think I am being fair, the assistants attorney general who drafted this bill obviously did so with a great deal of skill, and they also did so with a great deal of advocacy.

PATMAN : Well, when you are talking about--

DAVIS : And there is a difference between advocacy and a judicial determination of whether or not it is contrary to the constitution.

PATMAN : You are talking about a bill that the Attorney General himself does endorse, are you not?

DAVIS : Yes, sir.

PATMAN : And you are saying that some parts of it are illegal?

DAVIS : I say in my opinion--

PATMAN : --enough to take your opinion above his?

DAVIS : I don't know whether he has passed on it from that standpoint. I don't know whether he has passed on it from that standpoint.

: This is a recurring problem on rule-making.
I know--

DAVIS : The state is very familiar with--

: And the law on that 20-year optometry (?).

DAVIS : Yes, sir.

: It's the root of it right there.

DAVIS : That's exactly right.

: And what the Board of _____ Standards has been trying to do is get into other people's business is exactly the same thing as attorneys given legislative power.

DAVIS : That's what I am saying. The senior members of this committee will be very familiar I am sure with the Board of Optometry problems and the bill board problems, or how far you can go and how far you cannot go in rule-making delegation. Now, I say that this bill, Senator Patman, goes way beyond the rudimentary cases decided by the Supreme Court of Texas on rule-making delegation.

PATMAN : Has this changed from the time the bill was introduced?

DAVIS : No, sir.

PATMAN : Have you got any sort of legal brief for us on that?

DAVIS : I will be happy to provide you with one.

PATMAN : How about any citation of cases?

DAVIS : Be happy to provide that.

PATMAN : You haven't got them now though?

DAVIS : Well, I have given you the Commercial Standard Case and the Gulf Refining and Railroad Commission. I can give others and be happy to do so.

PATMAN : And they would show that this particular provision is directly contrary to laws?

DAVIS : In my opinion.

All right. I think of considerable consequence though is the decision that the legislature must make, of course this committee must make first, as to whether or not the Attorney General should have his traditional role in government changed from that of being a lawyer for the State of Texas, a lawyer for all these regulatory agencies as distinguished from administrative agencies with the power vested in it in this act, or whether that the authority contained in this act should be vested in some new

administrative agency or some existing administrative. And because there is a considerable difference between a policing administrative regulatory authority and the lawyer who represents that regulatory authority that has a lawyer-client relationship, and the Attorney General has traditionally been the lawyer for the state, not the administrator. And I think you can see he has already been referred to a number of times and I will jump over it in view of that. But he--in this act and Attorney General Hill acknowledges himself in an answer to Senator--a question of Senator Meier. In this act the Attorney General is vested with the authority of representing private litigants before the courts of this state. He does so in the name of the state, so to speak, but he gets recoveries for private litigants.

: That's what General Martin did in the drug case. In a sense he represented the State of Texas. It was also an action which several hundreds of _____ litigants were entitled to a part of the award.

DAVIS : But they had to file, Senator.

: Well, a substantial amount of money over there in claims I understand it by unnamed and unidentified persons.

DAVIS : Those who haven't filed yet.

I am simply saying to you this bill vests in the Attorney General of Texas the authority to represent private litigants, and--

: In a remote way--not in an aggrieved duty. He can't give advice to private--

DAVIS : That is a legislative decision.

: He is prohibited from giving advice to private citizens in that regard, but he is not prohibited from obtaining a recovery for citizens, for if he was then the drug companies would be a million or two dollars better off today than they are.

DAVIS : Again, sir, that is a public policy decision that the legislature must pass on. Should the Attorney General for the State of Texas representing the state have the authority to represent private litigants?

: (Inaudible)

DAVIS : All right, sir. (Laughter) I am interested in the fact that--I think it is interesting the district, county, and city attorneys are also vested with this authority. City attorneys through _____ charter, who have their sole authority from city charters.

: (Inaudible)

DAVIS : Yes it is the _____. (Inaudible due to coughing in microphone)

PATMAN : I hate to prolong the testimony, but let me ask one thing about the city attorneys. If they adopt--a home rule city adopts this substantially this same thing. Couldn't the city attorney enforce it anyway?

DAVIS : Yes, probably (?). We are not talking about that, Senator.

PATMAN : Well, we are just adopting _____
_____ (inaudible)

DAVIS : But we are not talking about that though. We are talking about acts passed by the legislature.

PATMAN : Right. But they can pass this same act as a city ordinance and the city attorney can enforce it.

DAVIS : If they passed it.

PATMAN : All right.

DAVIS : The Attorney General is not only vested with authority to represent private litigants in this class action nature but I was in a--the matter was discussed a little bit earlier, but if you will notice the remedies applied both individual remedies and class action remedies. It is rather cumulative in a way because they are punitive. The word is "and." It is not "are". There are five remedies which the judge and the court can award in a cumulative nature to any individual litigant and four remedies that they can award in a cumulative nature in class action and they run all the way from a restitution, a complete revocation and putting the parties back into the position they would have occupied had not this transaction occurred. To three times treble damages, punitive damages, in junction a cumulative

remedy type basis for these violations. Class action is exactly the same way except instead of treble damages it is actual damages but it is cumulative. It is a combining of these remedies if the court allows.

I am interested in--I think you ought to look at 17.57 over on page 21. This is really a unique cause of action. It says that if a--if my client is one of the defendants of one of these cases and I lose for my client, but I have simply used the promotional materials furnished to me by somebody else. All I have got to do is file a lawsuit against that somebody else and attach a copy of the judgment and cease doing the violation myself and that is all he has got to pay. He doesn't have any defense. The fact that I lost my case--the fact that I lost my case filed by the Attorney General or any of these litigants, all I've got to do is attach that to my petition and show that I received those advertising materials from some third party and he gave them to me and he has got to pay me. He has no defense. He doesn't have the ability or the opportunity to defend against me that they were fraudulent or deceptive in the very first instance. I think it's obviously in my opinion a serious change in remedy rights against litigants. The Attorney General is given in 1762 and 1763, and I realize that a portion of 1762 and a portion of 1763 are in the current law relating to the Consumer Commissioner, not the Attorney General. A portion of these sections are in the current law, but they have been expanding considerably and I remember a case involving some people down on Galveston Island who were complying with the gambling tax, the federal gambling tax, statistically. You know, you used to have a law that says if you were a gambler, you had to pay a tax to the federal government, and they give you a little stamp and you post it on the wall. But the Supreme Court of the United States declared that law unconstitutional because it caused those gamblers to incriminate themselves simply by buying the stamps, or buying the certificate. Well, I haven't briefed it thoroughly, but the investigating demands and requirements and then the utilization of the material acquired by the Attorney

General under those two sections. To enforce the provisions of this act would raise serious doubts in my mind about the constitutionality of it under the Fifth Amendment.

: (Inaudible)

DAVIS : All I know, Senator, is that a gambler doesn't have to pay his stamp tax because it is self-incrimination.

: (Inaudible)

DAVIS : Yes, sir, it is very interesting, sir.

: And the same people you know in Galveston--

(Laughter)

DAVIS : As Senator Schwartz knows, I am very familiar with that because I was an uncover agent. I was an uncover agent on Galveston Island in 1957 and closed down the Big B.

: Isn't that provision in the present law?

DAVIS : Not to full extent, sir. It has been expanded considerably.

: (Inaudible)

DAVIS : There are a great number of paragraphs in it. I know you don't want to hear a whole lot from it. I am doing all I can to keep avoiding it. (?)

Over on page 28, there is an attempt to comply with--or to require or to make personal service on people outside the State of Texas who violate our law I assume through the mails or some form of interstate commerce. I like to direct the attention of the drafter to the Minister's Case which Mr. Snead referred to earlier. A very complete answer to how you go about doing that--in my opinion that's Section I on page 28 is grossly inapplicable. If you will look at Article 2121-1 of Texas Insurance Code you will find a very complete compliance with the Minister's Case about how you get jurisdiction over people who transact business through the mail in this state.

: (Inaudible)

DAVIS : That one also is 114-2 and 2121-1. Now, Mr. Snead said it this way. Put the insurance companies one place or the other. I would say it differently to you. The Commissioner

of Insurance and the State Board of Insurance have carried out the duties and responsibilities vested in them by the legislature of this state, precisely as vested in them. And they have made the insurance companies toe the line on advertising and deceptive practices insofar as the statutes of this state have permitted and required them to do up to this point. Now, if it is felt by the legislature, this committee, the sponsors of this bill that the current legislative scheme of things or the statutory scheme of things is inadequate to protect the insurance consumer from deceptive trade practices, then add to that legislative scheme of things, broaden the legislative scheme of things, provide the revenues which you provide in Senate Bill 75 to the consumer but simply vest the administrative authority in the policing agency which is established under the Constitution of Texas and which is under the authority of all the statutes of this state as the regulatory agency over insurance matters.

PATMAN : A question, Mr. Chairman.

CHAIRMAN : Senator Patman.

PATMAN : Will, if the Insurance Commission eliminates deceptive practices in the insurance industry, there will be no petitions brought on this statute, will there?

DAVIS : I am not sure, Senator, and I am not being evasive because--

PATMAN : (Inaudible)

DAVIS : Let me try to tell you why. Because the rule-making power of the Attorney General is so completely broad that he has the ability to add to your statute which you are fixing to pass acts which constitute deceptive trade practices and I can't look into the minds of assistant attorney generals in the future to see what they are going to say constitutes a deceptive trade practice.

PATMAN : Well, you couldn't define deceptive trade practice as it is applied to all transactions throughout the entire State of Texas anyway, could you?

DAVIS : Well, I, yes, I think you can. I think you can provide a guideline in the definition and a standard under

which deceptive trade practices can be regulated. But once again I say to you, and the point I must try to get across is that if there is deficiency, if Senator Clower and Senator Gammage and other sponsors of the bill feel that the substantive law in this state is deficient because prior legislatures haven't done their job, then pass a bill adding to the substantive law, broaden it--

PATMAN : Maybe the application of this law will indicate some areas where we could give the Insurance Commission more authority.

DAVIS : But place that broadening of the authority in the administrative agency which is prepared to deal with insurance companies and insurance agents and who have done so in my opinion very honorably. This might keep in _____ (inaudible due to overlapping voices)

PATMAN : How about prior to that time.

DAVIS : That was eighteen years ago. In the last eighteen years one man's opinion is, they have done a superior job.

PATMAN : I am not disputing that. I think they have done a fine job too, but I still think that this would hurt their job in many ways.

DAVIS : Well, sir--

PATMAN : At least I question it.

DAVIS : The duality of regulation in our opinion would be a serious administrative mistake. It would be a serious public policy _____ to the legislature of this state. Whether it's in securities, whether it's in banking, whether it's in savings and loans, whether it's in insurance, the duality of regulation creates conflicts among the policing authorities of this state, and those conflicts ought to be avoided.

PATMAN : You have it many instances though. In fact, you've got it in the FDIC, savings and loans-- you've got it in the federal agencies, the controlled area projects in their means of working their business and the FCC and you've got our own Securities Commission that regulates those companies to some extent. This idea of duality is not _____ in some areas. I don't know if it is true in the insurance companies.

DAVIS : I would tend to disagree with you, and I

think I am entitled to explain to you why.

PATMAN : Sure.

: Well, in what kind of dispute (?)

DAVIS : The SEC. The SEC regulates interstate commerce, securities actions. The State Securities Board regulates intrastate transactions. The SEC does not regulate intrastate transactions. Mr. What's-His-Name over here at the State Security Board does not regulate intrastate transactions. They do generally both regulate securities in different areas of jurisdiction and responsibility.

PATMAN : In both of them they regulate the same companies. Isn't that true?

DAVIS : Sure. If you are engaged in interstate securities which are public sales and required by the law to be registered, both of them exercising the jurisdiction vested in them by two different governmental, one the federal government and second the state government, but here we are talking about two state agencies doing business under the same legislature in the same state and that's a completely different thing from the SEC to the State Securities Board.

: What are all these agencies that you are talking about that should regulate this one field; in effect though aren't all of these fields that are regulated subject to common law liability in a court of law even though the Securities Commission regulates them or any other commission?

DAVIS : In some areas they are, Senator.

: Okay.

DAVIS : Common law problems are what you are talking about?

: Yeah.

DAVIS : But they also have some other _____
_____ (inaudible due to noise in microphone).

: I am inclined to agree with you by _____
what you say in regard to the duality and hiatus whatever you want to call the gap that might exist in dual relations, but all those sayings, that's all very well and good, but in all of my experience on both sides of this fence, I still don't believe the consumer has a place to go in the Insurance Department and talk to any lawyer

who will proceed against any _____ (inaudible due to noise in microphone)--who is guilty of a deceptive practice of any _____ person _____ revenue for himself and others. Now what he does have is a very good force and a very fine agency _____ it is a continuation of such a fraud against the general public or such a means of practice which, you know, detrimental to the public's interest, to the shareholders, the stockholders, policyholders, whatever you want to call it, policyholders first, and as it should be, but you still don't have, Will, and everything you said and everything that Bob said, so _____ a place to go.

: Pardon me?

: He did _____ that place to go--

DAVIS (?)

: You didn't hear me on that bit.

SCHWARTZ

: Your commission needs to have an office staff with a guy, you know, and I am going to mention Ed Veal's name because Ed Veal is the fellow that gets all of my letters. He obviously gets all of Bill Moore's letters too.

DAVIS

: And he produces results, doesn't he, Senator?

SCHWARTZ

: And Ed Veal is the only man I know over there I can write to him and say Joe Below has got a terrible complaint against Mickey Mouse Company, and Ed will write him and badger him and threaten him. Then, then when they fail to respond, Ed has to write them and tell them I have no further _____, except to ask you to call your lawyer.

DAVIS

: If the substantive law in the Texas Insurance Code is deficient in that regard and Senator Clower and Senator Gammage and the sponsors of this legislation feel that--Senator Schwartz feels that it is deficient and you want to add to the---if the regulatory authority of our state wants to add to the reform legislation, then draw up such a bill, or amend this one and vest that authority in Mr. Veal, or the Commissioner of Insurance, and we will support you.

: Well, I agree with what you doing if I can--

DAVIS

: I want Senator Gammage to ask me that question because my clients will support that legislation.

SCHWARTZ

: If we can't have a place over in the Attorney

General's Office for that fellow who can find that agency that protects him, then I want an office with a sign on it that says "Assistant Attorney General For Consumer Affairs" -- one in the Insurance Department because what the Insurance Department attorneys would do are protecting the policyholders and protecting those policyholders against you know the infractions by people in deceptive practices act.

DAVIS : To the extent that they have authority under the current law .

SCHWARTZ : And incidentally _____ Texas _____.

DAVIS : And if they don't have enough authority to give the remedies which this bill would say that you ought to have against insurance fraudulent practices, then give them the authority.

SCHWARTZ : I just want to make that a point because I have had a better education in that particular problem and so I meant on both sides of the fence. There is a deficiency within the regulatory authority of that agency today. You and I agree on that.

DAVIS : If there is, then put it there. Give them the ability--give them the ability to do more than they are currently doing but creating a new administrative agency in the Attorney General's Office with the rule-making power, with the discretionary power, it's legislative, it's judicial, and it's executive because under Section 4--Article IV--he is the executive in the state, you see, and he is the attorney for the state.

SCHWARTZ : I understand the state's right. I just want to point out the deficiency.

DAVIS : And if you have a superb administrative agency and they are in the habit of and they are accustomed to and they are financed by you already to do this type of work, and if there is deficiency in their ability to do it, then give them more ability. You see.

: (Inaudible)

DAVIS : If you think the Consumer Protection Division of the Attorney General's Office is not going to be up here asking for a considerable increase in their budget to do the same thing that the Insurance Department is already doing in the fields of

advertising and deceptive trade practices, they just can't do it in my judgment. If they are going to regulate all the things which this bill says they are going to regulate, they are going to be like any other administrative agency. They are going to have to have help and that's the old budget. And they are going to cease to being a lawyer to that extent for the State of Texas. And I don't know that there has been any evidence to say that the Insurance Department will not do the job that you expect them to do if you give them the same authority you are trying to give the Attorney General here. You see there hasn't been any testimony stated that the Insurance Department won't do it, refuse to do, aren't prepared to do it.

SCHWARTZ : Well, I can cite an example and Commissioner Cotton sitting behind you will agree with me he wrote 25 letters to a company _____-- (inaudible due to overlapping conversations)

DAVIS : Senator, under the current law-- All right--

SCHWARTZ : That's right and he said, "Pay those policyholders." And the company said, "We ain't going to pay them." And the Commission kept saying, "Pay them." And we jaw-boned and paid them when he did not have any authority that he can rely on--

DAVIS : Under the current law.

SCHWARTZ : --except the good solid threat, you know, to make the company pay the policyholders.

DAVIS : Under the current law.

SCHWARTZ : Under the current law.

DAVIS : But with Senator Clower's remedies in this bill, he don't have to threaten them, and I am saying to you simply that there's absolutely no validity to an argument, no evidence to support the validity of an argument that with the powers in this bill the Insurance Department could not and would not do a better job in the field of insurance consumer protection than the Attorney General because they won't be deluded with automobile dealers and retail firms. They will be doing only insurance consumer protection and not having to worry about everybody else who the Attorney General is vested with regulatory authority in this bill.

: (Inaudible)

DAVIS : Thank you very much.

CHAIRMAN : Thank you, Mr. Davis. Now the Chair calls Mr. J. Sam Winters.

WINTERS : Mr. Chairman, I am Sam Winters, lawyer in Austin. I represent the Texas Life Convention. I don't have anything to add. I can't think of anything to say that hasn't already been said several times. The Texas Life Convention is for strong regulation. We think it should be under one head. We think that the expertise of the Insurance Department should be used. We think they are the ones that have it and that's where it should be and I think they ought to have the power you want to give them.

CHAIRMAN : Thank you, Mr. Winters. Any questions of Mr. Winters? If not, the Chair calls Mr. Herbert Tigner, Houston.

PATMAN : I believe he is the last witness? Is he not, Mr. Chairman? He is the last witness?

CHAIRMAN : Yes, he is the last witness.

TIGNER : I am Herbert G. Tigner of Houston, Texas. I am President of the Southern Life Insurance Company. _____
_____(Inaudible--witness not talking into microphone)--and up until two weeks ago, I was president of Union Standard Life Insurance Company and had been president of those companies for eighteen years. Just by way of _____ credentials that I am going to try to take very little of your time. I took over the Southern Life Insurance Company when even the Insurance Department said it could not be saved. Bob Snead _____ me when he said that if you had ever had a chance to start even you--

(End of Side 1 of Tape 3)

(Testimony of Mr. Tigner continues) --about everything you can think of including appearing before legislative committees and the State Board of Insurance and the Commissioner of Insurance on many occasions. Senator Bob Gammage, I might say that during these eighteen years, I have attended the Insurance Department many times--(Inaudible)--and I am very proud of some _____. I might say that you could inquire of Ed Veal or anybody else in the Department and these companies have been _____ to security deposit holders in fields arousing usually the most controversy. Now something over a million dollars of hospitalization premiums many of them involving many old people--

(Inaudible--witness is not talking into microphone and other microphones are open to noise and confusion) And a proportion of my complaints _____ are amazingly few because I _____.

(Impossible to understand this witness' testimony.)--doesn't mean that I haven't had complaints, and gentlemen, you will have complaints if you run an insurance company and a good many of them regardless of who you are, they are complaints made to the State Board of Insurance. I would like any objective person to look at some of the complaints that are made, but they have been relatively few.

Now the thing that immediately strikes me about this proposal is the other ruthless _____ almost destruction of _____ that would be visited upon a man trying to build an independent organization. Now, they say you are not important anymore in this state for anybody to build an independent organization from small beginnings. Then what I have to say really is not important. If it is important for any young man or one not so young to look to the mountains of his own independent endeavor, that's not important any more. But it seems to me that this bill and everything it's said here has been oriented to some massive organizations with unlimited funds that can respond to any damages or any penalties and ought to be beat over the head and be bloodied to their knees.

Now I know, I have even tried to defend my own lawsuits on occasion, but I have gone into the courts to do so. I can't say that I even won one of them, but I nevertheless went and defended them. And, you gentlemen here, and I _____ lawyer against insurance companies in my _____ (inaudible due to cough in microphone), but you gentlemen here know that it is almost a miracle (?) whether you are right or wrong as in insurance (?) it is almost a miracle to win a lawsuit. It doesn't matter whether you are right or wrong. It is almost _____ (cough)--now let's recognize it. I don't know whether we want to--whether we want to call it justice or not, but the _____ (inaudible). Invariably and I have suffered several

experiences on that over eighteen years. They are always decided against you. So they decided against you, so your only place might be in the _____. You go to the _____ where you have lost the _____ and you are--that is the predicate for the beginning of a class action. Already as you know _____ will grant three or four times the attorney's fees under 3.62 and 6.1--three or four times the amount of controversy (?). That stays you to even contesting in most instances, even if objectively you think you are right. Now, remember, when I said this first, I have less complaints--I have tried to serve my policyholders--I have less complaints percentagewise than most people. I have tried to state to the Insurance Department, and everybody in the Insurance Department--all of them know--just where I stood, and if I get a complaint, I try to explain it to them in some _____ (inaudible). So therefore you have the force and result of this bill as regards an insurance company, as regards my particular segment of the insurance company business. The force and effect of it is much greater _____ than it is for most of other enterprises because I will guarantee you that an insurance company is less likely to win in court than any other company in this state. Now, you get a class action. You try to defend it. Are we to say in practical effect _____ you'd better not _____. No _____. Now, of course, if that's true, who pays the price? Who pays the price of really, and I have tried to _____ this that 93 percent of the people who take policies will tell you the truth--at least 93 percent. There is 7 to 10 percent _____ of those people who don't tell you the truth, and therefore since all the business, all industry, all _____ must be based upon the people who are paying the price. They avail themselves of the seller. Therefore, they pay for the misdoings of these people who misrepresent Texas (?). Now, we have--I have been a claims lawyer (?)--I see some claims lawyers sitting here and God Bless Them--(Laughter)--some very able ones I might add--but on average all of that goes into the constantly enhanced projects for _____ the hospitalization insurance. It is even in a charge for _____ (?). Let us now--let me now say

that a class action against an independent company (?), if what I hear of class actions is true, there is an inducement of multiple claims. How it comes about, I don't know but it does come about. That sort of action can well, remember, independent companies are no longer important, so get this--that could well destroy an independent company. Does it stop with the class action? What happens if massive (?) class action suit goes past that and into the _____ of the insurance company reserves. Of course, then, they can't complain (?)--so under insurance laws they are in _____ possession and can destroy the company by it (?). I think you well know a class action might well destroy an independent company that could make--I do want to say that only _____ composition of a millionaire (?), an organizer of an insurance company--and this is not important--that from my independent category of a man--and I think _____ what happens--then it says--this bill says that it is in--it will be placed in--if a bill comply that it will be placed in some sort of a receivership under this act. But there are also the insurance procedures so that it destroys the company by a class action (?). So you have conflict here between the procedures of handling a company which is a _____ under the insurance laws and under the provisions of this one. So much for that. I know the rest of this _____, I know you are all tired. I have hoped that I had something that might be of value to say to you. I am on the low road and maybe not on the high road that you have been traveling so far with more able witnesses.

But the next thing I want to say is that you cannot destroy a company without going _____ (?). The next thing I wish particularly to say is--(inaudible due to cough in microphone) --it would be easy for _____ been working, moderate size insurance company executive to make a mistake. I have made mine--I've made a bushel--I have made mistakes on advertising. Was I intentionally doing so? I think not. _____ (inaudible). But I made them. I made the State Board of Insurance clobber me about some advertisement that they got out. I was not properly

disciplined in a number of things that I had to _____. The fact that there are very few complaints about it speaks to those about what I would do if I were--if this was just me, it wouldn't be significant, but this is 90 percent of the independent insurance industry. There is a regrettable category and I also _____(?), but these are on average earnest, hard-working men trying to build an independent _____(?) which is really hard after eighteen years--really hard. So many _____--only by the Grace of God have I succeeded moderately (?).

The next thing is I don't know what sort of advertising would comply or not comply with this bill. What are you going to say? Unless you are going to spend the whole of your treasury, you have to--in advertising you have to give a shorthand rendition. Try and write it. Try and write five or six pages of policy provisions and tell the people anything that will get any response and not have somebody say that you misrepresented it and probably not violate some provision of this law both written and as we said by administrative legislation to come to _____. Now, that is a quandry. I don't believe an independent insurance man would dare to advertise. I don't believe he would dare to write an advertisement. You have no moderation. You have no calling to your attention, you did wrong there. And not a _____. And when you are trying to do seventeen things at once, you make mistakes, you don't do it. And all of you _____. I have done very well with my insurance companies, but I have come the hard road. In this state I would like--that there remain the opportunity for other men to tread. I think you are closing the door. Thank you very much.

CHAIRMAN : Are there any questions of Mr. Tigner?
Senator Andujar.

ANDUJAR : Do I understand then that if we have suits, the damages can include attorney fees, treble damages, punitive fees, you can indeed put the company in receivership. Now if this plaintiff turns out to have been somewhat malicious in his intentions and fails perhaps to win the suit, the only recourse a company such as yours would have would be that the court could award him--award you your

attorney fees if he can pay it. As I read this, that's it.

TIGNER : I would doubt that very much (?).

ANDUJAR : It says that on finding the court that the action was groundless and brought in bad faith, the court may award to the defendant--that would be your company--reasonable attorney fees for all of your trouble and the hazard in which you were placed. You would get your attorney fees paid. Is that right?

TIGNER : That's all I see. (?)

PATMAN (?) : Let me ask. Don't the rules of civil procedure provide that you can ask the parties to a suit, claimants in particular, to put up a bond if the judge feels like _____?

: You can rule the cost, but that only includes the cost of the suit. It does not include attorney's fees.

: The cost of suits to the State of Texas you can.

PATMAN : Pardon?

: The county gets its fees for holding trials.

PATMAN : That's right. What about depositions?

: (Inaudible)

PATMAN : Well, I know, but I mean the county doesn't get any of that.

: No, it goes back to the _____.

PATMAN : Mr. Chairman.

CHAIRMAN : Yes, sir.

PATMAN : What about Gene Fondren's amendments--the one that he suggested to us. Are they submitted by anybody?

CHAIRMAN : They were passed around to everyone. I have three copies that he gave to me--it points out the three amendments.

PATMAN : I am not sure who is going to sponsor those. Are you going to sponsor them?

: I had it in mind, but as a matter of fact, I had hoped it would go to subcommittee so that _____.

PATMAN : I'll send them up and I am not sure I wouldn't vote to take them out later on. But, pardon?

: Mr. Chairman, are there other witnesses?

CHAIRMAN : Senator Schwartz has one that the Chair

had joined him to make that I would like to consider, first, because it comes in order after one of the _____. (Inaudible due to noise and confusion in microphone)

: Mr. Chairman, if I may, I would like to close and reserve the right to ask Mr. Longley and Mrs. Levatino to speak to the technical matter raised by the amendments and other matters _____ the Commission.

CHAIRMAN : The Schwartz-Brooks amendment which is Committee Amendment Number 5 is an amendment that would take the city attorney out of that particular section for this reason. A county attorney and a district attorney are elected public officials.

: What section are you on?

CHAIRMAN : The city attorney--it's Section 17.____ (?) (inaudible due to cough and noise in microphone). It's on page 11-- the city attorney is not an elected official. He is the instrument of a Mayor normally to a point and therefore I think you get into some real technical political issues. (?)

: (Inaudible)

CHAIRMAN : It is the amendment of the Subcommittee.
: Yes, it is acceptable. Some city attorneys are there.

: Oh, I wouldn't tell. (Laughter)

: (Inaudible).

: One in Ganado.

CHAIRMAN : And the amendment is acceptable. So is there objection to its adoption?

: (Inaudible).

: Well, it now reads, "A district or county attorney?"

CHAIRMAN : Yes, sir. In _____ to elected public officials, and I think this is generally true of most of the areas in which we utilize that local court. (Overlapping conversations of many members, none of which is audible).

: (Inaudible)

: There was an addition to the amendment in

regard to _____.

SCHWARTZ : I agree with the amendment that was adopted.

I am saying do you have an amendment to that amendment of that Section--

: Taking out a model act--model act.

: Yeah.

: And after we--it is the same as the one we
had but different words.

: I don't think it does.

CHAIRMAN : Senator Patman sends up the following
committee amendment which was explained earlier. It would amend
subsection 19 of the Substitute. It is 17.46.

: What are we talking about, Mr. Patman, in
the amendment? (Laughter).

CHAIRMAN : On page 5 of the Substitute, there is a
Subsection 19 in parenthesis down toward the bottom of the page. It
is very short now. In your previous bill, it says, "Represent or
your Committee Substitute, it says "Representing that a guarantee
would have (inaudible due to cough in microphone)-certain involved
rights of injury which it does not have are involved." The committee
amendment offered by Senator Patman would change that wording to say,
"Representing that a guarantee or warranty conferred or involved rights
or remedies which it does not have are involved provided however"--(this
is the new line)--"provided however that nothing in this subchapter
shall be construed to expand the implied warranty of merchantability."

: Merchantability.

CHAIRMAN : You certainly write big words. As defined
in Section 2.314-2.318 of the Business and Commerce Code you involve
obligations in excess of those that are appropriate to the bill.

: Mr. Chairman, that amendment is acceptable.

CHAIRMAN : The amendment is acceptable to the author
being Committee Amendment Number 6. Is there objection to its adoption?
The Chair hears none. The amendment is adopted.

PATMAN : Yeah, I apologize for not having additional
copies made.

: Mr. Chairman, I've got a _____ motion.

(Laughter)

CHAIRMAN : There is one more amendment up there. The other amendment Senator Patman sent up was also discussed at _____. Amend the Substitute Subsection (d) to Section 17.50, page 12. You would actually add Subsection (d). It does not have a Sugsection (d).

: Mr. Chairman--

CHAIRMAN : (c)--Subsection (c).

: And, Mr. Chairman, this amendment is _____ except one. I would like to be recognized and ask that Mr. Longley be allowed to explain it.

CHAIRMAN : Okay. Amendment A(?)add a subsection (d) which would say, "And act or practice required or specifically permitted by or under federal statute, rule or regulation or under state law." And the Chair recognizes Mr. Longley.

LONGLEY : Mr. Chairman, we respectfully like to present to the committee that we will oppose this amendment from the standpoint of the drafting of the bill in that it is vague and indefinite to --as far as the exemption is concerned. This will add a subsection (d) which might give the idea that anything which is not specifically covered by another federal statute, rule, or regulation or under state law, just by reason that the practice was not substantive would be all right. And so, for that reason, we would--

PATMAN : Mr. Chairman, then I will withdraw the amendment.

CHAIRMAN : Okay. Senator Patman withdraws that particular amendment. (Inaudible due to overlapping conversations).

PATMAN : I don't know how many others--somebody else may want to offer that amendment. I am just withdrawing it myself. Now, I don't know how many other amendments Mr. Fondren had, but he had one here relating to class action. I can't quite understand it so I am not offering that. If anybody else wants to offer it--

CHAIRMAN : (Inaudible) It probably could be offered on the floor after it has been worked out. Now Senator Meier sent up-- and did you keep a copy of your amendment, Senator Meier?

MEIER : Yes.

CHAIRMAN : Will you explain it?

MEIER : I will do that quickly. It is also Section 17.50 on page 12 under these _____. It would add Subsection b--a new subsection (b)--"Nothing in this subchapter shall apply to actions or transactions permitted under laws administered by other state agencies and regulatory bodies acting under statutory authority of the State of Texas, provided that such state agencies and regulatory bodies have pursuant into their statutory authority promulgated rules and regulations governing deceptive trade practices and deceptive advertising." Well, all that amendment attempts to do, Mr. Chairman and members of the committee, is to track the provision that has been discussed in this uniform proposed act or whatever it is properly called--model act--.

CHAIRMAN : The amendment is acceptable to the author. Is there objection to its adoption? The Chair hears none. The amendment is adopted. It becomes Amendment Number--Committee Amendment Number 7.

GAMMAGE : Mr. Chairman, I respectfully reconsider Amendment 3 so that you can modify the language in the amendment and adopt it. And then I will read the whole text for you. (Inaudible due to noise and confusion and witness not talking loud enough--also coughing into microphone). Quote Section 17.51 Conflict of Regulations. "Regulations of the Original _____ Policy. Regulations issued by the Consumer Protection Division under this subchapter may not--(and here add "duplicate or")--and take up again--"be in conflict with rules or regulations issued by another state agency, board or commission of Texas pursuant to the constitutional or statutory authority. Nothing in this subchapter prohibits or limits the state agency, board or commission of Texas from issuing--(and here insert "_____ and enforcing") rules and regulations pursuant to the authority invested in the agency board, or commission by statute or the constitution." These are the two insertions that Bob Snead suggested.

CHAIRMAN : Senator Gammage asks unanimous consent to reconsider the vote by which the Committee adopted Committee Amendment Number 3. Is there objection to that request? If not, the request

is granted. Now Committee Amendment Number 3 as originally passed is before the committee, and Senator Gammage sends up--or you withdraw--

GAMMAGE : I withdraw the amendment.

CHAIRMAN : --or you withdraw--he withdraws his original amendment and sends up a new Committee Amendment Number 3 which he has explained. Was there any questions about the additional words? If not, Senator Gammage moves adoption of the new Committee Amendment Number 3. Is there objection? The Chair hears none. The amendment is adopted. You want to make your motion?

: Wait, wait, Mr. Chairman. You got Senator Meier's Amendment adopted before we adjourn. However, we have had Commissioner Clay Cotton to sit here all afternoon listening to a lot of testimony and I asked him to look at this bill in particular and to give us--make available his expertise in this field, and I wonder if we might just let him look at one or two short items that I know of that I would like to raise concerning the bill before we adjourn. I don't mind if you want to limit it to 15 minutes or 10 minutes or whatever, but I think we need to look at--

: Mr. Cotton, my experience has been with him--he best spend time to look it over.

: That's right--he can come direct to the point.

: Well, to look it over and have--

CHAIRMAN : The Chair calls Mr. Cotton.

COTTON : Mr. Chairman, I didn't understand whether the Committee wished me to make some observations or whether I was being called just to respond to some questions from Senator Meier here?

CHAIRMAN : Okay. Senator Meier.

MEIER : Well, I just have one or two things I want to ask you about, Mr. Cotton. In particular, I think you had pointed out to me a conflict in the bill as regards receivership conditions, and I wish you would point those out to the committee for the benefit of the committee.

COTTON : Yes, this is an area in which our--

: Which section of the bill are we talking about now?

COTTON : I believe there are three sections in the bill that--I will locate them--that refer to receiverships and two of those sections also referred to revocation of licenses and certificates of authority. These areas do give me serious concern. I believe that the first one that occurs first in 17.48 of paragraph D.

: What's the page number of that?

MEIER : Page 10.

COTTON : And it is about the seven or eighth line down and begins in the middle of the page. "Order of the court may also include the appointment of a receiver, or a sequestration of assets on a person who has been ordered by a court to make restitution under this section." It also appeared--

MEIER : Orders of the court may also include the appointment of a receiver?

COTTON : Yes, sir. And also appears in 17.25, page 13, at the bottom of the page, Subsection 5 of Section B, which reads, "Any other relief which the court deems proper including the appointment of a receiver or the revocation of a license or certificate of authority to engage in the business in this state. If he doesn't, it has not been satisfied." It also appears in --at the top of page 15 which is Article--would be 17.53, Section B, Subsection 5, which also reads, "Any other relief which the court deems proper including the appointment of a receiver or the revocation of a license or certificate to engage in business in this state." Now, I feel that this is a very serious problem insofar as the administration of this act and our total administration of the Texas Insurance Code in its entirety. Historically, I don't know how long this statute has been on the books, but Article 1.19--may I borrow your book just a minute--Article 1.19, the very last sentence in that article reads as follows: "No action shall be brought of any _____ by any person other than the Board for closing up the affairs or to enjoin or _____ or interfere with the prosecution of a business of any such insurance company organized under the laws of this state." Now, Texas has the Uniform Liquidation

Act which provides that the liquidator appointed by the Board will be appointed as receiver beginning delinquency proceedings or any proceedings which the receiver should be appointed by a court. I am not certain that this is entirely a conflict, but I would be seriously concerned that we would have a receivership brought about by a court of some other county than Travis County and a receiver appointed in an area where neither the court had had experience in receivership liquidation of a receivership or a receiver that the court might attempt to appoint would have experience in the liquidation of a receivership, or the handling of a receivership of the insurance company of a specialized art, and the reason that the NAIC recommended a model act was due to the fact that the assets of insolvent companies were being dissipated and squandered and that the return to policyholders and the serving of the policyholder's interest was not being met by this general receivers (?) that ordinarily vested in a court. And, in addition to that, the two sections that deal with revocations of the certificates of authority like a copy plate that in an action brought under this act that some court might revoke the certificate of authority of an insurance company, maybe even without our knowledge. At least we would not be in charge of who should be prosecuted and we may suddenly find dumped in our lap a company without a license to do business in the state that has been revoked by a court in Amarillo. And ordinarily when, _____ is called the _____ companies, when we move into a receivership or a revocation of license, we at least are prepared to try to handle it at the point that _____ drastic action can take on it. We have a company--we found we have a company that was placed in receivership, let's say in Amarillo, their license has been revoked and this knowledge comes to me by way of newspaper, would create a most difficult situation for us to protect policyholders.

MEIER : Also, Mr. Cotton, I want to ask you if having listened to the testimony concerning the contents of the act in terms of its expansion upon the substantive law concerning the recovery for deceptive trade practices or advertising practices, in your experience would you tell the members of the Committee if you feel whether or

not if the same substantive law remedies were included within the provisions of the Insurance Code, whether or not that any aggrieved party would go lacking for proper representation by private attorneys as opposed to being represented by the Attorney General's Office in this field?

COTTON : Well, Senator, it is my opinion that the authority was invested in the Attorney General's Office by _____ amendment to the Insurance Code that we would have a capacity that the public could receive some attention.

MEIER : And what you are saying that--as I interpret your answer to mean that if the substantive provisions of the Insurance Code were changed along the lines of what's proposed by this statute, and instead of placing the authority to prosecute the actions, class actions or individual actions, or whatever, in the Attorney General's Office or in the district attorney's office or in the county attorney's office, is the state left to private practicing attorneys that there would be no deficiency of people to properly represent the aggrieved parties, be they individuals or classes?

COTTON : Well, Senator, you are not--then you are by your question excluding the bringing of a lawsuit by an attorney who is employed by the state?

MEIER : Yes, sir. Do you agree with my statement, or do you not agree?

COTTON : As I understand the act, the recovery for individuals that are ancillary to the suit that will be brought by the Attorney General in connection with this, I would have to say I believe this to be correct, Senator.

MEIER : All right, thank you. That's all I have.

CHAIRMAN : Any questions of the Commissioner? We appreciate your being here. Yes, sir.

SCHWARTZ : Commissioner Cotton, I believe you were waiting for a copy of an amendment to come back on which it has been suggested by the representatives of the insurance industry. It would carry the burden-- the exemption that exists in the present law in this

bill. I have been assured that they will present for our consideration on the floor, and I am going to offer an amendment to the Insurance Code, or an amendment to this bill which would give to the Insurance Commission the same kind of powers to act on behalf of the consumers that would be given to the Attorney General establishing some sort of a dual system and keeping it a single system. As the present Commissioner, are you ready to assume those additional responsibilities in the Insurance Department and do you think that's a workable solution to the problem?

COTTON : Well, Senator, as long as I am Commissioner I am going to try to assume the responsibility of any laws that are enacted. Of course, it would--(inaudible due to cough in microphone)--be an expansion of our--(inaudible due to coughing in microphone). I think it would certainly be within the capacity of the Department to perform those same duties there.

SCHWARTZ : The amendment by Senator Meier took the insurance field out of this bill anyway. What I am trying to do now is to be absolutely certain with this amendment that it is done in terms that it ought to be done in. Your amendment, Senator, too might _____ by inference or by direction as well as some indirection, but not in the legal sense that it is, you know, it is impossible to misconstrue, but as I understand it and I would like Mr. _____ to follow this up if I ask him. But as I understand it, you all are willing to provide the _____ (?)--(cough)--in some draft of amendment that would embody all these rights in the Insurance Division in that consumer protection function? Is that correct?

COTTON : Yes, sir.

: I stated so under oath. I will bring you the amendment.

COTTON : Senator, would there be any objection to carrying those simultaneously on the Board (?)

SCHWARTZ : Well, we have already adopted the amendment by Senator Meier. It does the duty in the language that he _____ (inaudible due to overlapping conversations).

: He exempts them (?) simultaneously on the

floor.

: He exempts anything, Senator. (Verbiage inaudible due to overlapping conversations).

: What you've got--in my amendment, you've got--you exempt every agency of state government.

COTTON : Would it go into the field of _____ (??)?

: Well, I don't know. I haven't done it here. I've added a Section E which just--(inaudible--overlapping voices)

: It's acceptable to the author, I thought.

: My amendment--no, my amendment exempts any agency that has adopted any deceptive practice rules and regulations. _____ (Verbiage inaudible due to noise and confusion in microphone). And others may have too.

MEJER (?) : That's not to say that some insurance company is not going to violate those rules.

: Mr. Chairman, I would like to ask a question. If we are going to have an open discussion where everybody wants to --you know we could do this on everybody else's time and just adjourn this meeting and we can all sit around down somewhere else and do this.

CHAIRMAN : (Inaudible).

: Either that or you have strict enforcement of the rules.

SCHWARTZ : Mr. President, I'd like to send up the amendment at this time simply because I think it ought to be clarified as to this--I am not sure that I am voting for my amendment on the floor unless I find that the agencies have deceptive practice rules and regulations that are _____ of that that have some enforcement authority to do what might be done here. I don't know how many agencies have that same authority, but I do know the Insurance Department must have some and could obtain more. This is a copy of the language as to what it does.

CHAIRMAN : Thank you, Mr. Cotton. We will move on now to the--Senator Schwartz sends up a proposed committee amendment. We were giving the author time to look at it. (Much noise and confusion).

: Mr. Chairman, I think I understand the substance of the amendment. I would like to be recognized to speak in opposition, and I would yield to Mr. Longley because, Senator, we have got a hell of a constitutional problem.

CHAIRMAN : The Chair recognizes Mr. Longley.

LONGLEY : Senator, if I understand you correctly what you wanted to do is to give the administrative agency which would adopt the rules and regulations with regard to--

SCHWARTZ : Well, I think you need to read the Meier Amendment. I don't know, gentlemen, where--(inaudible due to overlapping conversations)

LONGLEY : I am not saying that the Meier Amendment would have, you know, my support--

(End of Side 2 of Tape 3)



SENATE COMMITTEE ON HUMAN RESOURCES

SENATE CHAMBER
AUSTIN, TEXAS 78711

July 13, 1976

John Payton
Staff Director

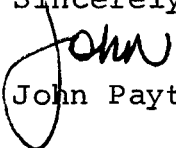
Senator Chet Brooks,
Chairman
Senator Bob Gammage,
Vice Chairman
Senator Betty Andujar
Senator Bill Braecklein
Senator Ron Clower
Senator Lloyd Doggett
Senator Ike Harris
Senator Frank Lombardino
Senator Bill Meier
Senator Walter Mengden
Senator Bill Patman

Ms. Polly Miller
Calendar Clerk
Texas Senate
State Capitol
Austin, Texas

Dear Polly:

Senator Brooks has authorized me to make available to Randy McClanahan all tapes containing pertinent information on S. B. 75, the Deceptive Trade Practices Act. The Senator appreciates your assisting Mr. McClanahan in this matter.

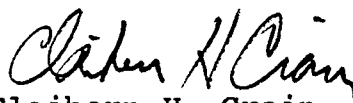
Sincerely,


John Payton

JP/st

SB 75
63rd

I hereby attest that the attached is a true
and accurate transcript of the official recording
of the testimony pertaining to the University of
Texas System School of Nursing before the Texas
Senate Finance Committee February 21, 1973.


Claiborn H. Crain

Director of Media Services
November 9, 1976

FINANCE COMMITTEE

Erwin : All right, sir. The -- the last institution is our system wide school of nursing, which now has institutions in Austin, El Paso, Ft. Worth, Galveston, Houston and San Antonio. And I'm as proud of this progress, Senator, as anything we've done.

Last year, September of last year, we had 3 nursing schools -- I mean Sept. of '71, -- we had 3 nursing schools, one in Austin, one Galveston, one in San Antonio with only 460 students. And with the help you all gave us and the financial support you gave us, in the current September, this present school year, we've increased that number from 460 to 870. And in '73, September of next year we will have 1,300 students. And I think that's a pretty remarkable progress in the face of nursing shortages everywhere that we increased our enrollment from 460 to 1,300 in two years. And it's only because you've given us the money to make that possible.

Aikin : Mr. Chairman -- could I ask a question?

Erwin : Sir, yes sir.

Austin so much.....

Aikin : I wonder why they cut (inaudible due to distance from mike) --

Erwin : Sir?

Aikin : I wonder why the recommendation from the LBB cut your request for Austin?
You ask about 700 and they recommended about three for the Austin nursing school.

Erwin : I see what he's talking about, but I don't know the answer.. You know?

Dean Wilman? Beg your pardon, madam president.

(laughter) Dr. Wilman, the question is, why was the -- the present appropriation of Austin is 549, and the LBB recommendation is 323. What counts for that reduction in appropriation?

WILMAN : I assume that that has some relationship to the fact that we are under the/ Coordination Board. Maybe the LBB could speak to that.

Erwin : Has Mr. Pace explained that?

Aikin : Yes.

Erwin : There was a committee appointed that worked with the Coordinating Board and they came up with -- with a -- the things they came up with.

Erwin : I'd like to talk them about it.

Erwin : We'd be very happy to talk to -- for you to talk to them about it, Senator.

SENATOR Snelson: You did such a good job under those line items.

Erwin : Let me, let me suggest to you -- where are those forms? One of the things is, Senator, one of the things is that -- go ahead -- J B -- go ahead and get through and let me --

Aikin : That's what we've done, we _____, that's the whole thing.

Erwin : One of the things they did is that at the last minute in this Committee deliberations they decided to establish a "kitty" and give it to the Coordinating Board, and tell the Coordinating Board then to give it back to us if we got the students we said we were going to have. Now, we can't very well hire people and make arrangements to spend money we're not going to know about until next September.

Aikin : That's right.

Erwin : So, at considerable effort, I have here the names of the 1,300 people we're going to have next September, with their names and addresses, and anybody wants to check on -- check them, but we think that money ought to be appropriated to the nursing schools now, because (laughter) -- they they are, and it's not some imaginary figure.

Aikin : (voices overlapping) -- that much money?

Erwin : Yes sir. It will give us an extra \$900,000, based on those 1,300 people.

Aikin : Now -- we'll use the latest available figures for -- not here, but everywhere all through this budget --

Erwin : Well, what I'm saying is, sir, that they -- under this committee's recommendation -- under the LBB Budget, they've appropriated this money to the Coordinating Board for them to give us when we show up with the people next September. But, we need the money now so we can hire people.

Aikin : If we had the figures before we get through this bill we'll use them.

Erwin : You have right there the 1,300 people that are enrolled, been accepted and their names and addresses are right there. And

we'd like for the money in the first year of the biennium to be distributed. That means Austin will get an extra \$343,000.

Aikin : And they deserve it.

Erwin : But, the names of the people that want to -- (laughter)
-- and --

Aikin : What he did, he -- we get started, you know, and that's always a reall good argument, and he got started and then he got started the second time, and then we're going to go on the (formula) now, -- so when we went on the formula, why then we multiplied 'em out and it didn't go that way .--

Erwin : Well, you see -- we're not -- see, what they did --

Aikin : -- You can ask the President back there, she's sitting right there. What happened --

Erwin : That's true, -- but, -- we're not asking to break the formula. We just want the formula applied to the real human beings that are going to be in school next September because we're increasing our enrollment....say at Austin, we're increasing it from 302 to 370. And Ft. Worth, we're increasing from 65 to 190. Well, we want the money based on 190 people that are going to actually be in school in Ft. Worth next September.

Aikin : ____ Coordinating Board certify to this? I mean, won't they --

Erwin : Well, we'll give you an affidavit that those people are enrolled, there are their names and addresses and we've already accepted them.

Aikin : Why do we have to go through the Coordinating Board?

Erwin : I never have tried to do that, Senator. (laughter)

Hightower : Say no more.

Erwin : With respect to line item no. 2, all other general administration, we would like to have an extra \$30,000 a year there for a graduate dean. We don't want to have to have a graduate dean in each one of these 6 nursing schools, but we need someone to supervise the graduate program at all 6 of the schools, and if we have that money we could hire such a person.

Aikin : How much you want?

Erwin : \$30,000 a year, sir. In line item 2.

And then, in line item 8, we need to increase that -- least the facilities and services in Houston, we do not yet have a building. In San Antonio we were -- I mean in El Paso, we were able to buy a nursing school building that had \$1 million federal grant with it, so we only had to pay \$1 million for a \$2 million building, and we now have that school housed, we are completing a building here in Austin, but -- and we have one in Galveston, but we don't have any facilities in Houston.

So, we're having to lease the space there, and we need an extra \$50,000 a year to lease the space for the nursing school in Houston. That's line item 8.

Then on --

Aikin : How much is that?

Erwin : \$50,000.

Aikin : All right.

Erwin : Then in -- in -- at the Houston Nursing School there is not a line item on this sheet I'm reading nor the one you're looking at, but on 13(c) for Initial Equipment Expense, we -- in Houston, for 1-time expenditure in the first year of the biennium we need \$80,000.

Aikin : We don't have it in 13c?

Erwin : No sir, I say -- you didn't have it, I was just asking to put it in. In order to get that nursing school in Houston, opened and buy the equipment, it's a one-time expenditure...ah...for example, in Houston, we have 97 students there this year, we're going to have 220 students next year. That's----

Aikin : What was -- the figure

Hightower : What was the figure, Frank?

Erwin : \$80,000, a one-time figure. But, I'm trying to justify it by saying that we didn't have a school there last year, this year we've got 97 students, next year we'll have 220 students, so that shows you --

Aikin : You've got to have equipment --

Erwin : Got to have the equipment though, yes sir.

And then, since we're opening 3 new schools, the one in Houston, the one in Ft. Worth, and the one in San Antonio, that's --

-- I beg your pardon, it's the El Paso, Ft. Worth and Houston schools that are being -- we would -- Dean Wilman tells me that she badly needs an appropriation and she says \$800,000 there, but if we can get \$400,000 I'm sure we can make good use of it.....to -- to open these 3 new schools.

It's really the same kind of an expense that I asked for equipment expense at Houston, but there are other -- other one-time -- see, we don't have anything. We're just renting some space, and we've got to furnish it, and we need at least \$400,000 in the first year of the biennium to get these 3 new nursing schools open. Ah -- this nursing program is amazing.

Aikin : Now, wait a minute. You've asked for \$30 for a dean, and 50 on --

Erwin : Yes sir.

Aikin : -- lease facilities and 80...

Erwin : -- And 80 --

Aikin : -- down here on --

Erwin : -- and then 400.

Aikin : \$400,000?

Erwin : Yes, sir. (laughter) If you say it fast, it doesn't sound like so much. (laughter)

: _____ pretty fast --

Erwin : We've got -- the problem is that we've got 3 new schools that absolutely start from scratch, and we've got a building in El Paso, but we have nothing in Houston or Ft. Worth and we're going to have to rent space, buy equipment, buy furniture, buy everything to open those schools. (voices in background)

Aikin : That's non-recurring --

Erwin : That's non-recurring, yes sir. Yes sir. Ah -- I want to tell you our experience because I think it would be some satisfaction to you. We came to you 2 years ago and told you about our problems with nursing, and told you if you'd give us some money for recruiting we thought we could fill up these schools. You gave us \$25,000, we hired a man for 1 year, and he did such a fine job that we've now got more applicants than we can take care of. But we've increased the enrollment from 460 to 1,300 in 2 years, and I think that's pretty remarkable.

Aikin : Nurses?

Erwin: --for \$ 25,000. So that \$25,000 was well spent.

Mr. Chairman, that completes our presentation.

(This is the end of discussion of the nursing school.)

AMENDMENT NO. _____

BY Mauzy

Amend Committee Substitute for S.B. No. 75 as follows:

(1) Strike "or" on line 14, page 3, in paragraph (18) subsection (b) of quoted Section 17.46;

(2) Strike the period following "goods" on line 21, page 3, in paragraph (19), subsection (b) of quoted Section 17.46 and insert in lieu thereof "; or";

(3) Insert a new paragraph (20) to subsection (b) of quoted Section 17.46 to read as follows:

(20) Selling or offering to sell, either directly or associated with the sale of goods or services, a right of participation in a multi-level distributorship. As used herein, 'multi-level distributorship' means a sales plan for the distribution of goods or services in which promises of rebate or payment are made to individuals, conditioned upon those individuals recommending or securing additional individuals to assume positions in the sales operation, and where the rebate or payment is not exclusively conditioned on or in relation to proceeds from the retail sales of goods.

mauzy

ADOPTED

APR 13 1973

Charles Schuab
SECRETARY OF SENATE

FLOOR AMENDMENT No. 8

By Rude

Amend C.S.S.B. No. 75, first printing, by striking therefrom the word "Remedies" where it appears on lines 20 and 22 of page 1 of the bill, and substituting in lieu thereof in each place the word "Protection."

ADOPTED

APR 19 1973

Frank Schuck
SECRETARY OF SENATE

#2

AMENDMENT NO. _____

BY Mary

Amend Committee Substitute for S.B. No. 75 by
striking "Rule 26 of the Federal" in subsection (c) of quoted
Section 17.61, on page 11, line 18, and inserting in lieu thereof
" the Texas".

ADOPTED

APR 13 1973

Frank Schuck
SECRETARY OF SENATE

(#3)

AMENDMENT NO. _____

BY

Maury

Amend Committee Substitute for S.B. No. 75 by
inserting the following in quoted Section 17.51, subsection (a)
on page 5, line 62, between "Code," and "a":

or by an act or practice or type of actt or practice
occurring subsequent to the time the act or practice or type of
act or practice was declared unlawful ~~deceptive, or unconscionable~~
to the consumer by a final judgment of an appellate court of
proper jurisdiction and venue of this state that was reported
officially,™.

Issue 12

ADOPTED

APR 13 1973

Charles Schuck

SECRETARY OF SENATE

#4

Floor Amendment No. _____ :

By: Murray

Amend Committee Substitute for Senate Bill 75 by striking out all of subparagraph (e) of Section 17, same being lines 23 through 27, both inclusive, on page 16 of the printed Committee Substitute and inserting in lieu thereof the following:

"(e) An action under this section may not be maintained if an administrative class action under Section 14 of this Article has been initiated or has resulted in a final determination regarding the same acts or practices and the same defendant in the action under this section."

Mr. 10

ADOPTED

APR 13 1973

Charles Schuck

SECRETARY OF SENATE

AS

Amendment No. _____

By, Thelton

Amend S.S.B. No. 75 as follows:

(1) in paragraph (1) of quoted Section 17.45 place a period following "use" on line 43, page 1, and strike the remainder of the paragraph;

(2) in paragraph (4) of quoted Section 17.45 place a period following "services" on line 54, page 1, and strike the remainder of the paragraph.

ADOPTED

APR 13 1973

Charles Schuck

SECRETARY OF SENATE

(#6)

AN ACT

relating to the definition and regulation of deceptive and unlawful trade practices, advertising or acts including unlawful competition, acts or practices of insurers, and protection of consumers; providing administrative and judicial remedies and procedures for carrying out the Act; providing civil penalties for violations; prescribing the extent of the applicability of the Act; providing for class actions; amending Chapter 17, Business & Commerce Code, as amended, by adding Subchapter E; repealing Chapter 10, Title 79, Revised Civil Statutes of Texas, 1925, as amended (Articles 5069-10.01 et seq., Vernon's Texas Civil Statutes); amending Sections 13 and 7, Article 21.21, Insurance Code, as amended, and adding new Sections 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. Chapter 17, Business & Commerce Code, as amended, is amended by adding Subchapter E to read as follows:

"SUBCHAPTER E. DECEPTIVE TRADE PRACTICES AND
CONSUMER REMEDIES

"Section 17.41. SHORT TITLE. This subchapter may be cited as the Deceptive Trade Practices - Consumer Remedies Act.

"Section 17.42. WAIVER: PUBLIC POLICY. Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void.

"Section 17.43. CUMULATIVE REMEDIES. The provisions of

171973 Engrossed
Engrossing Clerk

By: Mauzy, et al

S.B. No. 75

A BILL TO BE ENTITLED

AN ACT

relating to the definition and regulation of deceptive and unlawful trade practices, advertising or acts including unlawful competition, acts or practices of insurers, and protection of consumers; providing administrative and judicial remedies and procedures for carrying out the Act; providing civil penalties for violations; prescribing the extent of the applicability of the Act; providing for class actions; amending Chapter 17, Business & Commerce Code, as amended, by adding Subchapter E; repealing Chapter 10, Title 79, Revised Civil Statutes of Texas, 1925, as amended (Articles 5069-10.01 et seq., Vernon's Texas Civil Statutes); amending Sections 13 and 7, Article 21.21, Insurance Code, as amended, and adding new Sections 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. Chapter 17, Business & Commerce Code, as amended, is amended by adding Subchapter E to read as follows:

"SUBCHAPTER E. DECEPTIVE TRADE PRACTICES AND
CONSUMER PROTECTION

"Section 17.41. SHORT TITLE. This subchapter may be cited as the Deceptive Trade Practices-Consumer Protection Act.

"Section 17.42. WAIVERS: PUBLIC POLICY. Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void.

"Section 17.43. CUMULATIVE REMEDIES. The provisions of

this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law. The provisions of this subchapter do not in any way preclude other political subdivisions of this state from dealing with deceptive trade practices.

"Section 17.44. CONSTRUCTION AND APPLICATION. This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.

"Section 17.45. DEFINITIONS. As used in this subchapter:

"(1) 'Goods' means tangible chattels bought for use.

"(2) 'Services' means work, labor, and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods.

"(3) 'Person' means an individual, partnership, corporation, association, or other group, however organized.

"(4) 'Consumer' means an individual who seeks or acquires by purchase or lease, any goods or services.

"(5) 'Merchant' means a party to a consumer transaction other than a consumer.

"(6) 'Trade' and 'commerce' mean the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value,

1 wherever situated, and shall include any trade or commerce directly
2 or indirectly affecting the people of this state.

3 "(7) 'Documentary material' includes the original
4 or a copy of any book, record, report, memorandum, paper,
5 communication, tabulation, map, chart, photograph, mechanical
6 transcription, or other tangible document or recording, wherever
7 situated.

8 "(8) 'Consumer protection division' means the
9 antitrust and consumer protection division of the attorney
10 general's office.

11 "(9) 'Knowingly' means actual awareness of the falsity
12 or deception, but actual awareness may be inferred where objective
13 manifestations indicate that a person acted with actual awareness.

14 "Section 17.46. DECEPTIVE TRADE PRACTICES UNLAWFUL.

15 "(a) False, misleading, or deceptive acts or practices in
16 the conduct of any trade or commerce are hereby declared unlawful.

17 "(b) The term 'false, misleading, or deceptive acts or
18 practices' includes, but is not limited to, the following acts:

19 "(1) passing off goods or services as those of
20 another;

21 "(2) causing confusion or misunderstanding as to the
22 source, sponsorship, approval, or certification of goods or
23 services;

24 "(3) causing confusion or misunderstanding as to
25 affiliation, connection, or association with, or certification
26 by, another;

1 "(4) using deceptive representations or designations
2 of geographic origin in connection with goods or services;

3 "(5) representing that goods or services have
4 sponsorship, approval, characteristics, ingredients, uses,
5 benefits, or quantities which they do not have or that a person
6 has a sponsorship, approval, status, affiliation, or connection
7 which he does not;

8 "(6) representing that goods are original or new if
9 they are deteriorated, reconditioned, reclaimed, used, or
10 secondhand;

11 "(7) representing that goods or services are of a
12 particular standard, quality, or grade, or that goods are of a
13 particular style or model, if they are of another;

14 "(8) disparaging the goods, services, or business
15 of another by false or misleading representation of facts;

16 "(9) advertising goods or services with intent not
17 to sell them as advertised;

18 "(10) advertising goods or services with intent not
19 to supply a reasonable expectable public demand, unless the
20 advertisements disclosed a limitation of quantity;

21 "(11) making false or misleading statements of fact
22 concerning the reasons for, existence of, or amount of price
23 reductions;

24 "(12) representing that an agreement confers or
25 involves rights, remedies, or obligations which it does not have
26 or involve, or which are prohibited by law;

1 "(13) knowingly making false or misleading statements
2 of fact concerning the need for parts, replacement, or repair
3 service;

4 "(14) misrepresenting the authority of a salesman,
5 representative or agent to negotiate the final terms of a consumer
6 transaction;

7 "(15) basing a charge for the repair of any item in
8 whole or in part on a guaranty or warranty instead of on the value
9 of the actual repairs made or work to be performed on the item
10 without stating separately the charges for the work and the charge
11 for the warranty or guaranty, if any;

12 "(16) disconnecting, turning back, or resetting the
13 odometer of any motor vehicle so as to reduce the number of miles
14 indicated on the odometer gauge;

15 "(17) advertising of any sale by fraudulently
16 representing that a person is going out of business;

17 "(18) using or employing a chain referral sales plan
18 in connection with the sale or offer to sell of goods, merchandise,
19 or anything of value, which uses the sales technique, plan,
20 arrangement, or agreement in which the buyer or prospective buyer
21 is offered the opportunity to purchase merchandise or goods and
22 in connection with the purchase receives the seller's promise or
23 representation that the buyer shall have the right to receive
24 compensation or consideration in any form for furnishing to the
25 seller the names of other prospective buyers if receipt of the
26 compensation or consideration is contingent upon the occurrence

1 of an event subsequent to the time the buyer purchases the
2 merchandise or goods;

3 "(19) representing that a guarantee or warranty
4 confers or involves rights or remedies which it does not have or
5 involve, provided, however, that nothing in this subchapter shall
6 be construed to expand the implied warranty of merchantability
7 as defined in Sections 2.314 through 2.318 of the Business &
8 Commerce Code to involve obligations in excess of those which are
9 appropriate to the goods; or

10 "(20) selling or offering to sell, either directly
11 or associated with the sale of goods or services, a right of
12 participation in a multi-level distributorship. As used herein,
13 'multi-level distributorship' means a sales plan for the
14 distribution of goods or services in which promises of rebate or
15 payment are made to individuals, conditioned upon those individuals
16 recommending or securing additional individuals to assume positions
17 in the sales operation, and where the rebate or payment is not
18 exclusively conditioned on or in relation to proceeds from the
19 retail sales of goods.

20 "(c) It is the intent of the legislature that in construing
21 Subsection (a) of this section the courts to the extent possible
22 will be guided by Subsection (b) of this section and the
23 interpretations given by the Federal Trade Commission and federal
24 courts to Section 5(a)(1) of the Federal Trade Commission Act [15
25 U.S.C.A. 45(a)(1)].

26 "Section 17.47. RESTRAINING ORDERS. (a) Whenever the

1 consumer protection division has reason to believe that any person
2 is engaging in, has engaged in, or is about to engage in any act
3 or practice declared to be unlawful by this subchapter, and that
4 proceedings would be in the public interest, the division may
5 bring an action in the name of the state against the person to
6 restrain by temporary or permanent injunction the use of such
7 method, act, or practice. The consumer protection division may
8 bring any action under this section against a licensed insurer
9 or insurance agent for a violation of this subchapter, Article
10 21.21, Texas Insurance Code, as amended, or the rules and
11 regulations of the State Board of Insurance issued under Article
12 21.21, Texas Insurance Code, as amended, only on the written
13 request of the State Board of Insurance or the commissioner of
14 insurance.

15 "Nothing herein shall require the consumer protection
16 division to notify such person that court action is or may be
17 under consideration. Provided, however, the consumer protection
18 division shall, at least seven days prior to instituting such
19 court action, contact such person to inform him in general of the
20 alleged unlawful conduct. Cessation of unlawful conduct after
21 such prior contact shall not render such court action moot under
22 any circumstances, and such injunctive relief shall lie even if
23 such person has ceased such unlawful conduct after such prior
24 contact. Such prior contact shall not be required if, in the
25 opinion of the consumer protection division, there is good cause
26 to believe that such person would evade service of process if

1 prior contact were made or that such person would destroy relevant
2 records if prior contact were made.

3 "(b) An action brought under Subsection (a) of this section
4 may be commenced in the district court of the county in which the
5 person against whom it is brought resides, has his principal place
6 of business, is doing business, or in the district court of the
7 county where the transaction occurred, or, on the consent of the
8 parties, in a district court of Travis County. The court may
9 issue temporary or permanent injunctions to restrain and prevent
10 violations of this subchapter and the injunctions shall be issued
11 without bond.

12 "(c) In addition to the request for a temporary or permanent
13 injunction in a proceeding brought under Subsection (a) of this
14 section, the consumer protection division, on a finding by the
15 court that the defendant has engaged or is engaging in a practice
16 declared to be unlawful by this subchapter, may request a civil
17 penalty of not more than \$2,000 per violation, not to exceed a
18 total of \$10,000, to be paid to the state.

19 "(d) The court may make such additional orders or judgments
20 as are necessary to compensate identifiable persons for actual
21 damages or restoration of money or property, real or personal,
22 which may have been acquired by means of any act or practice
23 restrained. Damages may not include any damages incurred beyond
24 a point two years prior to the institution of the action by the
25 consumer protection division. Orders of the court may also include
26 the appointment of a receiver or a sequestration of assets on a

1 person who has been ordered by a court to make restitution under
2 this section has failed to do so within three months after the
3 order to make restitution has become final and nonappealable.

4 "(e) Any person who violates the terms of an injunction
5 under this section shall forfeit and pay to the state a civil
6 penalty of not more than \$10,000 per violation, not to exceed
7 \$50,000. In determining whether or not an injunction has been
8 violated the court shall take into consideration the maintenance
9 of procedures reasonably adapted to insure compliance with the
10 injunction. For the purposes of this section, the district court
11 issuing the injunction shall retain jurisdiction, and the cause
12 shall be continued, and in these cases, the consumer protection
13 division, or the district or county attorney with prior notice
14 to the consumer protection division, acting in the name of the
15 state, may petition for recovery of civil penalties under this
16 section.

17 "(f) An order of the court awarding civil penalties under
18 Subsection (e) of this section applies only to violations of the
19 injunction incurred prior to the awarding of the penalty order.
20 Second or subsequent violations of an injunction issued under
21 this section are subject to the same penalties set out in
22 Subsection (e) of this section.

23 "Section 17.48. DUTY OF DISTRICT AND COUNTY ATTORNEY.

24 "(a) It is the duty of the district and county attorneys
25 to lend to the consumer protection division any assistance
26 requested in the commencement and prosecutions of action under

1 this subchapter.

2 "(b) A district or county attorney, with prior written
3 notice to the consumer protection division, may institute and
4 prosecute actions seeking injunctive relief under this subchapter,
5 after complying with the prior contact provisions of Subsection
6 (a) of Section 17.47 of this subchapter. On request, the consumer
7 protection division shall assist the district or county attorney
8 in any action taken under this subchapter. If an action is
9 prosecuted by a district or county attorney alone, he shall make
10 a full report to the consumer protection division including the
11 final disposition of the matter. No district or county attorney
12 may bring an action under this section against any licensed insurer
13 or licensed insurance agent transacting business under the
14 authority and jurisdiction of the State Board of Insurance unless
15 first requested in writing to do so by the State Board of
16 Insurance, the commissioner of insurance, or the consumer
17 protection division pursuant to a request by the State Board of
18 Insurance or commissioner of insurance.

19 "Section 17.49. EXEMPTIONS. (a) Nothing in this subchapter
20 shall apply to the owner or employees of a regularly published
21 newspaper, magazine, or telephone directory, or broadcast station,
22 or billboard, wherein any advertisement in violation of this
23 subchapter or regulations issued under this subchapter is published
24 or disseminated, unless it is established that the owner or
25 employees of the advertising medium have knowledge of the false,
26 deceptive, or misleading acts or practices declared to be unlawful

1 by this subchapter or regulations issued under this subchapter,
2 or had a direct or substantial financial interest in the sale or
3 distribution of the unlawfully advertised good or service.
4 Financial interest as used in this section relates to an
5 expectation which would be the direct result of such advertisement.

6 "(b) Nothing in this subchapter shall apply to acts or
7 practices authorized under specific rules or regulations
8 promulgated by the Federal Trade Commission under Section 5(a)(1)
9 of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)]. The
10 provisions of this subchapter do apply to any act or practice
11 prohibited or not specifically authorized by a rule or regulation
12 of the Federal Trade Commission. An act or practice is not
13 specifically authorized if no rule or regulation has been issued
14 on the act or practice.

15 "Section 17.50. RELIEF FOR CONSUMERS. (a) A consumer may
16 maintain an action if he has been adversely affected by any of
17 the following:

18 "(1) the use or employment by any person of an act
19 or practice declared to be unlawful by Section 17.46 of this
20 subchapter;

21 "(2) a failure by any person to comply with an express
22 or implied warranty;

23 "(3) any unconscionable action or course of action
24 by any person; or

25 "(4) the use or employment by any person of an act
26 or practice in violation of Article 21.21, Texas Insurance Code,

1 as amended, or rules or regulations issued by the State Board of
2 Insurance under Article 21.21, Texas Insurance Code, as amended.

3 "(b) In a suit filed under this section, each consumer who
4 prevails may obtain:

5 "(1) three times the amount of actual damages plus
6 court costs and attorneys' fees reasonable in relation to the
7 amount of work expended;

8 "(2) an order enjoining such acts or failure to act;

9 "(3) orders necessary to restore to any party to the
10 suit any money or property, real or personal, which may have been
11 acquired in violation of this subchapter; and

12 "(4) any other relief which the court deems proper,
13 including the appointment of a receiver or the revocation of a
14 license or certificate authorizing a person to engage in business
15 in this state if the judgment has not been satisfied within three
16 months of the date of the final judgment. The court may not
17 revoke or suspend a license to do business in this state or appoint
18 a receiver to take over the affairs of a person who has failed
19 to satisfy a judgment if the person is a licensee of or regulated
20 by a state agency which has statutory authority to revoke or
21 suspend a license or to appoint a receiver or trustee.

22 "(c) On a finding by the court that an action under this
23 section was groundless and brought in bad faith or for the purpose
24 of harassment, the court may award to the defendant reasonable
25 attorneys' fees in relation to the amount of work expended, and
26 court costs.

1 "Section 17.51. CLASS ACTIONS. (a) If a consumer has
2 been damaged in an amount in excess of \$10 by an unlawful method,
3 act, or practice contained in Subsection (b) of Section 17.46 of
4 this subchapter, an act or practice in violation of Article 21.21,
5 Texas Insurance Code, as amended, or rules or regulations issued
6 by the State Board of Insurance under Article 21.21, Texas
7 Insurance Code, as amended, or by an act or practice or type of
8 act or practice occurring subsequent to the time the act or
9 practice or type of act or practice was declared unlawful or
10 deceptive to the consumer by a final judgment of an appellate
11 court of proper jurisdiction and venue of this state that was
12 reported officially, a consumer may bring an action on behalf of
13 himself and other consumers if the unlawful act or practice has
14 caused damage to the other consumers who are similarly situated,
15 to recover damages and relief as provided in this subchapter.

16 "(b) A plaintiff who prevails in a class action under this
17 subchapter may recover:

18 "(1) court costs and attorneys' fees reasonable in
19 relation to the amount of work expended in addition to actual
20 damages;

21 "(2) an order enjoining the act or failure to act;

22 "(3) any orders which may be necessary to restore
23 to any party to the suit any money or property, real or personal,
24 which may have been acquired in violation of this subchapter; and

25 "(4) any other relief which the court deems proper
26 including the appointment of a receiver or revocation of a license

1 or certificate to engage in business in this state if the judgment
2 has not been satisfied within six months of the date of issuance
3 of the final judgment. The court may not revoke or suspend a
4 license to do business in this state or appoint a receiver to
5 take over the affairs of a person who has failed to satisfy a
6 judgment if the person is a licensee of or regulated by a state
7 agency which has statutory authority to revoke or suspend a license
8 or to appoint a receiver or trustee.

9 "(c) On a finding by the court that an action under this
10 section was brought in bad faith or for purposes of harassment,
11 the court may award to the defendant reasonable attorneys' fees
12 in relation to the work expended, and court costs.

13 "(d) An action under this section may not be maintained
14 or shall be stayed if proceedings regarding an administrative
15 class action under Section 14, Article 21.21, Texas Insurance
16 Code, as amended, have been initiated regarding the same acts or
17 practices and the same defendant in the action under this section.

18 "Section 17.52. CLASS ACTION: PROCEDURE. (a) The court
19 shall permit one or more members of a class to sue or be sued as
20 representative parties on behalf of the class only if:

21 "(1) the class is so numerous that joinder of all
22 members is impracticable;

23 "(2) there are questions of law or fact common to
24 the class;

25 "(3) the claims or defenses of the representative
26 parties are typical of the claims or defenses of the class; and

1 "(4) the representative parties will fairly and
2 adequately protect the interests of the class.

3 "(b) An action may be maintained as a class action if the
4 prerequisites of Subsection (a) of this section are satisfied and
5 in addition;

6 "(1) the prosecution of separate actions by or against
7 individual members of the class would create a risk of:

8 "(A) inconsistent or varying adjudications
9 with respect to individual members of the class which would
10 establish incompatible standards of conduct for the party opposing
11 the class; or

12 "(B) adjudications with respect to individual
13 members of the class which would as a practical matter be
14 dispositive of the interests of the other members not parties to
15 the adjudications or substantially impair or impede their ability
16 to protect their interests; or

17 "(2) the party opposing the class has acted or refused
18 to act on grounds generally applicable to the class, thereby
19 making appropriate final injunctive relief or corresponding
20 declaratory relief with respect to the class as a whole; or

21 "(3) the court finds that the questions of law or
22 fact common to the members of the class predominate over any
23 questions affecting only individual members, and that a class
24 action is superior to other available methods for the fair and
25 efficient adjudication of the controversy. The matters pertinent
26 to the findings include:

1 "(A) the interest of members of the class in
2 individually controlling the prosecution or defense of separate
3 actions;

4 "(B) the extent and nature of any litigation
5 concerning the controversy already commenced by or against members
6 of the class;

7 "(C) the desirability or undesirability of
8 controversy concentrating the litigation of the claims in the
9 particular forum; and

10 "(D) the difficulties likely to be encountered
11 in the management of a class action.

12 "(c) In construing this section, the courts of Texas shall
13 be guided by the decisions of the federal courts interpreting
14 Rule 23, Federal Rules of Civil Procedure.

15 "(d) As soon as practicable after the commencement of an
16 action brought as a class action, the court shall determine by
17 order whether it is to be maintained as a class action. An order
18 under this subsection may be altered or amended before a decision
19 on the merits. An order determining that the action may or may
20 not be brought as a class action is an interlocutory order which
21 is appealable and the procedures provided in Rule 385, Texas Rules
22 of Civil Procedure, apply.

23 "(e) If the action is permitted as a class action, the
24 court shall direct to the members of the class the best notice
25 practicable under the circumstances, including individual notice
26 to all members who can be identified through reasonable effort.

1 "(f) The notice shall contain a statement that:

2 "(1) the court will exclude the member notified from
3 the class if he so requests by a specified date;

4 "(2) the judgment, whether favorable or not, will
5 include all members who do not request exclusion; and

6 "(3) any member who does not request exclusion, if
7 he desires, may enter an appearance through counsel.

8 "(g) A class action may not be dismissed, settled, or
9 compromised without the approval of the court, and notice of the
10 proposed dismissal, settlement, or compromise shall be given to
11 all members of the class in such manner as the court directs.

12 "(h) When appropriate, an action may be brought or
13 maintained as a class action with respect to particular issues
14 or a class may be divided into subclasses and each subclass treated
15 as a class, and the provisions of this section shall be construed
16 and applied accordingly.

17 "(i) The judgment in a class action shall describe those
18 to whom the notice was directed and who have not requested
19 exclusion and those the court finds to be members of the class.
20 The court shall direct to the members of the class the best notice
21 practicable under the circumstances, including individual notice
22 to all members who can be identified through reasonable effort.

23 "(j) In the conduct of a class action the court may make
24 appropriate orders:

25 "(1) determining the course of proceedings or
26 prescribing measures to prevent undue repetition or complication

1 in the presentation of evidence or argument;

2 "(2) requiring, for the protection of the members
3 of the class or otherwise for the fair conduct of the action,
4 that notice be given in such manner as the court may direct to
5 some or all of the members or to the attorney general of any step
6 in the action, or of the proposed extent of the judgment, or of
7 the opportunity of members to signify whether they consider the
8 representation fair and adequate, to intervene and present claims
9 or defenses, or otherwise to come into the action;

10 "(3) imposing conditions on the representative parties
11 or on intervenors;

12 "(4) requiring that the pleadings be amended to
13 eliminate allegations as to representation of absent persons, and
14 that the action proceed accordingly; or

15 "(5) dealing with similar procedural matters.

16 "(k) The filing of a suit under this section tolls the
17 statute of limitations for bringing a suit by an individual under
18 Section 17.50 of this subchapter. An order of the court denying
19 the bringing of a suit as a class action does not affect the
20 ability of an individual to bring the same or a similar suit under
21 Section 17.50 of this subchapter.

22 "Section 17.53. PRELIMINARY NOTICE. (a) At least 30 days
23 prior to the commencement of a suit for damages under Section
24 17.51 of this subchapter, the consumer must notify the intended
25 defendant of his complaint and make demand that the defendant
26 provide relief to the consumer and others similarly situated.

1 "(b) The notice must be in writing and sent by certified
2 or registered mail, return receipt requested, to the place where
3 the transaction occurred, the intended defendants' principal place
4 of business in this state, or if neither will effect notice, to
5 the office of the Secretary of State of Texas.

6 "(c) An action for injunctive relief under Section 17.51
7 of this subchapter may be commenced without compliance with
8 Subsection (a) of this section. Not less than 30 days after the
9 commencement of an action for injunctive relief, and after
10 compliance with the provisions of Subsection (a) of this section,
11 the consumer may amend his complaint without leave of court to
12 include a request for damages.

13 "(d) No damages may be awarded to a consumer class under
14 this section if within 30 days of receipt of the notice the
15 intended defendant furnished the consumer, by certified or
16 registered mail, return receipt requested, a written offer of
17 settlement. The offer of settlement must include a statement
18 that:

19 "(1) all consumers similarly situated have been
20 adequately identified or a reasonable effort to identify such
21 other consumers has been made, and a description of the class so
22 identified and the method employed to identify them;

23 "(2) all consumers so identified have been notified
24 that upon their request the intended defendant will provide relief
25 to the consumer and all others similarly situated, and a complete
26 explanation of the relief being afforded and a copy of the notice

1 or communication which the intended defendant is providing to the
2 members of the class;

3 "(3) the relief being afforded the consumer has been,
4 or if said offer is accepted by the consumer, will be given within
5 a stated reasonable period of time; and

6 "(4) the practice complained of has ceased.

7 "(e) Attempts to comply with the provisions of this section
8 by a person receiving a demand shall be an offer to compromise
9 and shall be inadmissible as evidence. Attempts to comply with
10 a demand shall not be considered an admission of engaging in an
11 unlawful act or practice. Evidence of compliance or attempts to
12 comply with the provisions of this section may be introduced by
13 a defendant for the purpose of establishing good faith or to show
14 compliance with the provisions of this section.

15 "Section 17.54. DAMAGES: DEFENSE. No award of damages
16 may be given in any action filed under Section 17.51 of this
17 subchapter if the defendant:

18 "(1) proves that the action complained of resulted
19 from a bona fide error notwithstanding the use of reasonable
20 procedures adopted to avoid any error; and

21 "(2) made restitution of any consideration received
22 from any member of the class.

23 "Section 17.55. PROMOTIONAL MATERIAL. If damages or civil
24 penalties are assessed against the seller of goods or services
25 for advertisements or promotional material in a suit filed under
26 Section 17.47, 17.48, 17.50, or 17.51 of this subchapter, the

1 seller of the goods or services has a cause of action against a
2 third party for the amount of damages or civil penalties assessed
3 against the seller plus attorneys' fees on a showing that:

4 "(1) the seller received the advertisements or
5 promotional material from the third party;

6 "(2) the seller's only action with regard to the
7 advertisements or promotional material was to disseminate the
8 material; and

9 "(3) the seller has ceased disseminating the material.

10 "Section 17.56. VENUE. An action brought under Section
11 17.50 or 17.51 of this subchapter may be commenced in the county
12 in which the person against whom the suit is brought resides, has
13 his principal place of business, or is doing business.

14 "Section 17.57. SUBPOENAS. The clerk of a district court
15 at the request of any party to a suit pending in his court which
16 is brought under this subchapter shall issue a subpoena for any
17 witness or witnesses who may be represented to reside within 100
18 miles of the courthouse of the county in which the suit is pending
19 or who may be found within such distance at the time of trial.
20 The clerk shall issue a separate subpoena and a copy thereof for
21 each witness subpoenaed. When an action is pending in Travis
22 County on the consent of the parties a subpoena may be issued for
23 any witness or witnesses who may be represented to reside within
24 100 miles of the courthouse of a county in which the suit could
25 otherwise have been brought or who may be found within such
26 distance at the time of the trial.

1 "Section 17.58. VOLUNTARY COMPLIANCE. (a) In the
2 administration of this subchapter the consumer protection division
3 may accept assurance of voluntary compliance with respect to any
4 act or practice which violates this subchapter from any person
5 who is engaging in, has engaged in, or is about to engage in the
6 act or practice. The assurance shall be in writing and shall be
7 filed with and subject to the approval of the district court in
8 the county in which the alleged violator resides or does business
9 or in the district court of Travis County.

10 "(b) The acceptance of an assurance of voluntary compliance
11 may be conditioned on the stipulation that the person in violation
12 of this subchapter restore to any person in interest any money
13 or property, real or personal, which may have been acquired by
14 means of acts or practices which violate this subchapter.

15 "(c) An assurance of voluntary compliance shall not be
16 considered an admission of prior violation of this subchapter.
17 However, unless an assurance has been rescinded by agreement of
18 the parties or voided by a court for good cause, subsequent failure
19 to comply with the terms of an assurance is prima facie evidence
20 of a violation of this subchapter.

21 "(d) Matters closed by the filing of an assurance of
22 voluntary compliance may be reopened at any time. Assurances of
23 voluntary compliance shall in no way affect individual rights of
24 action under this subchapter, except that the rights of individuals
25 with regard to money or property received pursuant to a stipulation
26 in the voluntary compliance under Subsection (b) of this section

are governed by the terms of the voluntary compliance.

"Section 17.59. POWERS OF RECEIVER. (a) When a receiver is appointed by the court under this subchapter, he shall have the power to sue for, collect, receive, and take into his possession all the goods and chattels, rights and credits, money, and effects, lands, tenements, books, records, documents, papers, choses in action, bills, notes, and property of every description, derived by means of any practice declared to be illegal and prohibited by this subchapter, including property with which such property has been mingled if it cannot be identified in kind because of the commingling, and to sell, convey, and assign the property and hold and dispose of the proceeds under the direction of the court. Any person who has suffered damages as a result of use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in the proceedings and may make any orders or judgments required.

"(b) If the claims of consumers remain unsatisfied after distribution of the assets, the court may order that all persons who knowingly participated in the unlawful enterprise be held jointly and severally liable to the extent of the unsatisfied

1 consumer claims if such person:

2 "(1) contributed substantial personal services,
3 money, credit, real, personal, or mixed property, or any other
4 thing of substantial value with the expectation of sharing in the
5 profits of the enterprise; and

6 "(2) had knowledge or should have had knowledge of
7 the unlawful purpose of the enterprise at the time such things
8 of value were contributed, or freely continued in the association
9 or other relationship after gaining knowledge of the unlawful
10 purpose of the enterprise.

11 "Section 17.60. REPORTS AND EXAMINATIONS. Whenever the
12 consumer protection division has reason to believe that a person
13 is engaging in, has engaged in, or is about to engage in any act
14 or practice declared to be unlawful by this subchapter, or when
15 it reasonably believes it to be in the public interest to conduct
16 an investigation to ascertain whether any person is engaging in,
17 has engaged in, or is about to engage in any such act or practice,
18 an authorized member of the division may:

19 "(1) require the person to file on the prescribed
20 forms a statement or report in writing, under oath or otherwise,
21 as to all the facts and circumstances concerning the alleged
22 violation and such other data and information as the consumer
23 protection division deems necessary;

24 "(2) examine under oath any person in connection
25 with this alleged violation;

26 "(3) examine any merchandise or sample of merchandise

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deemed necessary and proper; and

"(4) pursuant to an order of the appropriate court, impound any sample of merchandise that is produced in accordance with this subchapter and retain it in the possession of the division until the completion of all proceedings in connection with which the merchandise is produced.

"This section shall not apply to licensed insurers or licensed insurance agents transacting an insurance business in this state under the authority and jurisdiction of the State Board of Insurance unless the State Board of Insurance or the Insurance Commissioner has requested in writing that the consumer protection division file an action under Section 17.47 of this subchapter.

"Section 17.61. CIVIL INVESTIGATIVE DEMAND. (a) Whenever the consumer protection division believes that any person may be in possession, custody, or control of the original copy of any documentary material relevant to the subject matter of an investigation of a possible violation of this subchapter, an authorized agent of the division may execute in writing and serve on the person a civil investigative demand requiring the person to produce the documentary material and permit inspection and copying. This section shall not apply to licensed insurers or licensed insurance agents transacting an insurance business in this state under the authority and jurisdiction of the State Board of Insurance unless the State Board of Insurance or the Insurance Commissioner has requested in writing that the consumer protection division file an action under Section 17.47 of this subchapter.

1 "(b) Each demand shall:

2 "(1) state the statute and section under which the
3 alleged violation is being investigated, and the general subject
4 matter of the investigation;

5 "(2) describe the class or classes of documentary
6 material to be produced with reasonable specificity so as to
7 fairly indicate the material demanded;

8 "(3) prescribe a return date within which the
9 documentary material is to be produced; and

10 "(4) identify the members of the consumer protection
11 division to whom the documentary material is to be made available
12 for inspection and copying.

13 "(c) A civil investigative demand may contain a requirement
14 or disclosure of documentary material which would be discoverable
15 under the Texas Rules of Civil Procedure.

16 "(d) Service of any demand may be made by:

17 "(1) delivering a duly executed copy of the demand
18 to the person to be served or to a partner or to any officer or
19 agent authorized by appointment or by law to receive service of
20 process on behalf of that person;

21 "(2) delivering a duly executed copy of the demand
22 to the principal place of business in the state of the person to
23 be served;

24 "(3) mailing by registered mail or certified mail
25 a duly executed copy of the demand addressed to the person to be
26 served at the principal place of business in this state, or if

1 the person has no place of business in this state, to his principal
2 office or place of business.

3 "(e) Documentary material demanded pursuant to this section
4 shall be produced for inspection and copying during normal business
5 hours at the principal office or place of business of the person
6 served, or at other times and places as may be agreed on by the
7 person served and the consumer protection division.

8 "(f) No documentary material produced pursuant to a demand
9 under this section, unless otherwise ordered by a court for good
10 cause shown, shall be produced for inspection or copying by, nor
11 shall its contents be disclosed to any person other than the
12 authorized employee of the consumer protection division without
13 the consent of the person who produced the material. The consumer
14 protection division shall prescribe reasonable terms and conditions
15 allowing the documentary material to be available for inspection
16 and copying by the person who produced the material or any duly
17 authorized representative of that person. The consumer protection
18 division may use the documentary material or copies of it as it
19 determines necessary in the enforcement of this subchapter,
20 including presentation before any court. Any material which
21 contains trade secrets shall not be presented except with the
22 approval of the court in which the action is pending after adequate
23 notice to the person furnishing the material.

24 "(g) At any time before the return date specified in the
25 demand, or within 20 days after the demand has been served,
26 whichever period is shorter, a petition to extend the return date

1 for, or to modify or set aside the demand, stating good cause,
2 may be filed in the district court in the county where the parties
3 reside, or a district court of Travis County.

4 "(h) A person on whom a demand is served under this section
5 shall comply with the terms of the demand unless otherwise provided
6 by a court order.

7 "(i) Personal service of a similar investigative demand
8 under this section may be made on any person outside of this state
9 if the person has engaged in conduct in violation of this
10 subchapter. Such persons shall be deemed to have submitted
11 themselves to the jurisdiction of this state within the meaning
12 of this section.

13 "Section 17.62. PENALTIES. (a) Any person who, with
14 intent to avoid, evade, or prevent compliance, in whole or in
15 part, with Section 17.60 or 17.61 of this subchapter, removes
16 from any place, conceals, withholds, or destroys, mutilates,
17 alters, or by any other means falsifies any documentary material
18 or merchandise or sample of merchandise is guilty of a misdemeanor
19 and on conviction is punishable by a fine of not more than \$5,000
20 or by confinement in the county jail for not more than one year,
21 or both.

22 "(b) If a person fails to comply with a directive of the
23 consumer protection division under Section 17.60 of this subchapter
24 or with a civil investigative demand for documentary material
25 served on him under Section 17.61 of this subchapter, or if
26 satisfactory copying or reproduction of the material cannot be

1 done and the person refuses to surrender the material, the consumer
2 protection division may file in the district court in the county
3 in which the person resides, is found, or transacts business, and
4 serve on the person, a petition for an order of the court for
5 enforcement of Sections 17.60 and 17.61 of this subchapter. If
6 the person transacts business in more than one county, the petition
7 shall be filed in the county in which the person maintains his
8 principal place of business, or in another county agreed on by
9 the parties to the petition.

10 "(c) When a petition is filed in the district court in any
11 county under this section, the court shall have jurisdiction to
12 hear and determine the matter presented and to enter any order
13 required to carry into effect the provisions of Sections 17.60
14 and 17.61 of this subchapter. Any final order entered is subject
15 to appeal to the Texas Supreme Court. Failure to comply with any
16 final order entered under this section is punishable by contempt.

17 "Section 17.63. APPLICATION. The provisions of this
18 subchapter apply only to acts or practices occurring after the
19 effective date of this subchapter, except a right of action or
20 power granted to the attorney general under Chapter 10, Title 79,
21 Revised Civil Statutes of Texas, 1925, as amended, prior to the
22 effective date of this subchapter."

23 Sec. 2. (a) Amend Section 13, Article 21.21, Texas
24 Insurance Code, as amended, to read as follows:

25 "Section 13. Rules and Regulations. (a) The State Board
26 of Insurance is authorized to promulgate and may promulgate and

1 enforce reasonable rules and regulations and may order such
2 provision as is necessary in the accomplishment of the purposes
3 of this Article and Article 21.20, including, but not limited to,
4 such express provision within the purposes of these Articles as
5 it deems necessary or as is required to affect necessary uniformity
6 with the laws of other states or the United States or in conformity
7 with the adopted procedures of the National Association of
8 Insurance Commissioners notwithstanding any previous definition
9 or interpretation of terms used in these Articles had in or derived
10 from the common law or other statutory law of this state.

11 "(b) A petition may be submitted to the Board to adopt,
12 amend, or repeal a regulation. The petition must be signed by
13 100 interested persons and supported by evidence that a particular
14 act or practice has been or could be false, misleading or deceptive
15 to the insurance buying public, or that an act or practice declared
16 to be false, misleading, or deceptive by a regulation of the Board
17 is not in fact false, misleading, or deceptive. Within 30 days
18 after receipt of the petition the Board must either deny the
19 petition or initiate hearing proceedings under this section.

20 "(c) On denial of the petition the Board must state the
21 reason or reasons for denial in writing. Denial is expressly
22 authorized if the action sought by the petition would destroy
23 uniformity with the laws of other states or of the United States
24 or would not be in conformity with the adopted procedures of the
25 National Association of Insurance Commissioners.

26 "(d) If in response to the petition the Board determines

1 to hold a hearing, such hearing shall be open to the public and
 2 any person may present testimony, data, or other information in
 3 writing or orally to the Board regarding the acts or practices
 4 under consideration.

5 "(e) A person aggrieved by the denial of the hearing under
 6 Subsection (b) of this section or by the adoption, amendment, or
 7 repeal of a regulation or failure to issue a regulation under
 8 this section, may file a petition in a district court of Travis
 9 County for a declaratory judgment on the validity or applicability
 10 of a regulation adopted, amended, or repealed under this section
 11 or on the denial of a hearing under Subsection (b) of this section.
 12 The Board shall be made a party to the action. In a suit under
 13 this subsection the district court may issue injunctions.

14 "(f) The action of the Board in adopting, amending,
 15 repealing, or failing to adopt a regulation or denying a hearing
 16 may be invalidated only if it is found that it:

17 "(1) violates a constitutional or state statutory
 18 provision;

19 "(2) exceeds the statutory authority of the Board;

20 "(3) is arbitrary or capricious or characterized by
 21 abuse of discretion or unwarranted exercise of discretion;

22 "(4) is so vague that it does not establish
 23 sufficiently definite standards with which conduct can be
 24 conformed;

25 "(5) is made on unlawful procedure; or

26 "(6) is clearly erroneous in view of the reliable,

1 probative, and substantial evidence in the whole record as
2 submitted."

3 (b) Amend Section 7, Article 21.21, Texas Insurance Code,
4 as amended, to read as follows:

5 "Section 7. Cease and Desist Orders [~~and-Modifications~~
6 ~~Thereof~~].

7 "(a) If, after such hearing under the terms of Section 6
8 of the Act, the Board shall determine that the method of
9 competition or the act or practice in question is defined in
10 Section 4 of this Article, or rules or regulations issued under
11 this Article, or in Section 17.46 of the Business & Commerce Code,
12 as amended, and that the person complained of has engaged in such
13 method of competition, act or practice in violation of this Article
14 or rules and regulations issued under this Article or of the
15 Deceptive Trade Practices--Consumer Remedies Act (Sections 17.41
16 et seq., Business & Commerce Code), as specified in Section 17.46
17 of the Business & Commerce Code [Act], it shall reduce its findings
18 to writing and [~~shall~~] ~~issue and~~ cause to be served upon the
19 person charged with the violation an order requiring such person
20 to cease and desist from engaging in such method of competition,
21 act or practice. [?]

22 "(b) Until a petition appealing from such order shall have
23 been filed in a [~~the~~] District Court of Travis County, Texas, in
24 accordance with Subchapter F of Chapter 21 of the Insurance Code
25 of this state, or any amendment thereof, the Board may at any
26 time, upon such notice and in such manner as it shall deem proper,

1 modify or set aside in whole or in part any order issued under
2 this section.

3 "(c) Any person who violates the terms of a cease and
4 desist order under this section shall be given notice to appear
5 and show cause, at a hearing to be held in conformity with Section
6 6 of this Article, why he should not forfeit and pay to the state
7 a civil penalty of not more than \$1,000 per violation and not to
8 exceed a total of \$5,000. In determining whether or not a cease
9 and desist order has been violated, the Board shall take into
10 consideration the maintenance of procedures reasonably adapted
11 to insure compliance with the order.

12 "(d) An order of the Board awarding civil penalties under
13 Subsection (c) of this section applies only to violations of this
14 order incurred prior to the awarding of the penalty order."

15 (c) Amend Article 21.21, Texas Insurance Code, as amended,
16 by adding Sections 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and
17 24 to read as follows:

18 "Section 14. Administrative Class Action. (a) In connection
19 with the issuance of a cease and desist order as provided in
20 Section 7 of this Article or upon application of any aggrieved
21 person, the Board may, after notice and hearing as provided in
22 Section 6 of this Article, in connection with the issuance of a
23 cease and desist order resulting from a finding that an insurer
24 has engaged in a method of competition, act or practice in
25 violation of this Article, rules or regulations issued under this
26 Article, or Section 17.46, Business & Commerce Code, as amended,

1 or upon finding by the Board that the aggrieved person and persons
2 similarly situated were induced to purchase a policy of insurance
3 as a result of the insurer engaging in a method of competition,
4 act or practice in violation of this Article, rules or regulations
5 issued under this Article or Section 17.46, Business & Commerce
6 Code, as amended, the Board may require the insurer to account
7 for all premiums collected for policies issued during the
8 immediately preceding two years in connection with such acts in
9 violation of this Article and require: (i) such insurer to give
10 notice to all persons from whom such premiums were collected, and
11 (ii) to refund the total of all premiums collected from each such
12 person, electing to accept a premium refund in exchange for
13 cancellation of the policy of insurance issued. Premiums so
14 refunded shall be net of policy benefits actually paid by such
15 insurer while the policy of insurance was in force. The Board
16 shall specify a reasonable time within which the insurer shall
17 be required to make such premium refunds.

18 "(b) If an insurer fails to comply with the Board's
19 requirement to refund such premiums within the time specified,
20 the Board may, in addition to any other sanctions provided for
21 in the Insurance Code and other applicable laws, report such
22 failure to the Attorney General and request the Attorney General
23 to file a suit to enforce the Board's requirement for refund of
24 premiums. Venue for such suit shall lie in the District Court
25 of Travis County, Texas, and upon finding by the court that such
26 requirement of the Board was lawfully entered and that the insurer

1 has failed to comply with such requirement, the Court shall enter
2 an appropriate order to enforce such Board order. The Court may
3 enforce its order through contempt proceedings.

4 "(c) Compliance or attempts to comply with the Board's
5 requirement to refund premiums shall be an offer to compromise
6 and shall be inadmissible as evidence. Compliance or attempts
7 to comply with the Board's requirement for refund of premium shall
8 not be considered as admission of engaging in an unlawful act or
9 practice. Evidence of compliance or attempts to comply with the
10 Board's requirements of refund or premium may be introduced by
11 the defendant for the purpose of establishing good faith or to
12 show compliance with the Board's requirement.

13 "Section 15. Injunctions. (a) If the Board has reason
14 to believe that any person in the insurance business in this state
15 is engaging in, has engaged in, or is about to engage in any act
16 or practice declared to be unlawful by this Article or rules or
17 regulations issued under this Article or by Section 17.46 of the
18 Business & Commerce Code, as amended, and that proceedings would
19 be in the public interest, the Board may request the Attorney
20 General to bring an action in the name of the state against the
21 person to restrain by temporary or permanent injunction the use
22 of such method, act, or practice.

23 "(b) An action brought under Subsection (a) of this section
24 may be commenced in the district court of the county in which the
25 person against whom it is brought resides, has his principal place
26 of business, is doing business, or in the district court of the

1 county where the transaction occurred or any substantial portion
2 of the transaction occurred, or in a district court of Travis
3 County. The court may issue appropriate temporary or permanent
4 injunctions, and the injunctions shall be issued without bond;

5 "(c) In addition to the request for a temporary or permanent
6 injunction in a proceeding brought under Subsection (a) of this
7 section, the Attorney General, on a finding by the court that the
8 defendant has engaged or is engaging in a practice declared to
9 be unlawful by Article 17.46 of the Business & Commerce Code, as
10 amended, this Article, or rules or regulations issued under this
11 Article, may request a civil penalty of not more than \$2,000 per
12 violation and not to exceed a total of \$10,000 to be paid to the
13 state.

14 "(d) The court may make such additional orders or judgments
15 as are necessary to compensate indentifiable persons for actual
16 damages or restoration of money or property, real or personal,
17 which may have been acquired by means of any act or practice
18 restrained. Damages may not include any damages incurred beyond
19 a point two years prior to the institution of the action.

20 "(e) Any person who violates the terms of an injunction
21 under this section shall forfeit and pay to the state a civil
22 penalty of not more than \$10,000 per violation not to exceed
23 \$50,000. In determining whether or not an injunction has been
24 violated the court shall take into consideration the maintenance
25 of procedures reasonably adapted to insure compliance with the
26 injunction. For the purposes of this section, the district court

1 issuing the injunction shall retain jurisdiction, and the cause
2 shall be continued, and in such cases, the Attorney General with
3 prior notice to the Board, acting in the name of the state, may
4 petition for recovery of civil penalties under this section.

5 "(f) An order of the court awarding civil penalties under
6 Subsection (e) of this section applies only to violations of the
7 injunction incurred prior to the awarding of the penalty order.
8 Second or subsequent violations of an injunction issued under
9 this section are subject to the same penalties set out in
10 Subsection (e) of this section.

11 "Section 16. Relief Available to Injured Parties. (a)
12 Any person who has been injured by another's engaging in any of
13 the practices declared in Section 4 of this Article or in rules
14 or regulations lawfully adopted by the Board under this Article
15 to be unfair methods of competition and unfair and deceptive acts
16 or practices in the business of insurance or in any practice
17 defined by Section 17.46 of the Business & Commerce Code, as
18 amended, as an unlawful deceptive trade practice may maintain an
19 action against the company or companies engaging in such acts or
20 practices.

21 "(b) In a suit filed under this section, any plaintiff who
22 prevails may obtain:

23 "(1) three times the amount of actual damages plus
24 court costs and attorneys' fees reasonable in relation to the
25 amount of work expended;

26 "(2) an order enjoining such acts or failure to act;

1 "(3) any other relief which the court deems proper.

2 "(c) On a finding by the court that an action under this
3 section was groundless and brought in bad faith or for the purpose
4 of harassment, the court may award to the defendant reasonable
5 attorneys' fees in relation to the amount of work expended.

6 "(d) In an action under this section, damages may not
7 include any damages incurred beyond a point two years prior to
8 the institution of the action.

9 "Section 17. Class Actions. (a) If a member of the
10 insurance buying public has been damaged by an unlawful method,
11 act, or practice defined in Section 4 of this Article or by the
12 rules and regulations lawfully adopted by the Board under this
13 Article or by any practice defined by Section 17.46 of the Business
14 & Commerce Code, as amended, as an unlawful deceptive trade
15 practice, the Board may request the Attorney General to bring a
16 class action, or the individual damaged may bring an action on
17 behalf of himself and others similarly situated, to recover damages
18 and relief as provided in this section.

19 "(b) A plaintiff who prevails in a class action under this
20 section may recover:

21 "(1) court costs and attorneys' fees reasonable in
22 relation to the amount of work expended in addition to actual
23 damages;

24 "(2) an order enjoining the act or failure to act;

25 "(3) any other relief which the court deems proper.

26 "(c) On a finding by the court that an action under this

1 section was brought by an individual plaintiff in bad faith or
2 for the purpose of harassment, the court may award to the defendant
3 reasonable attorneys' fees in relation to the work expended and
4 court costs.

5 "(d) In an action under this section, damages may not
6 include any damages incurred beyond a point two years prior to
7 the institution of the action.

8 "(e) An action under this section may not be maintained
9 if an administrative class action under Section 14 of this Article
10 has been initiated or has resulted in a final determination
11 regarding the same acts or practices and the same defendant in
12 the action under this section.

13 "Section 18. Class Action: Procedure. (a) The court
14 shall permit one or more members of a class to sue or be sued as
15 representative parties on behalf of the class only if:

16 "(1) the class is so numerous that joinder of all
17 members is impracticable;

18 "(2) there are questions of law or fact common to
19 the class;

20 "(3) the claims or defenses of the representative
21 parties are typical of the claims or defenses of the class; and

22 "(4) the representative parties will fairly and
23 adequately protect the interests of the class.

24 "(b) An action may be maintained as a class action if the
25 prerequisites of Subsection (a) of this section are satisfied and
26 in addition:

1 "(1) the prosecution of separate actions by or against
2 individual members of the class would create a risk of:

3 "(A) inconsistent or varying adjudications with
4 respect to individual members of the class which would establish
5 incompatible standards of conduct for the party opposing the
6 class; or

7 "(B) adjudication with respect to individual
8 members of the class which would as a practical matter be
9 dispositive of the interests of the other members not parties to
10 the adjudications or substantially impair or impede their ability
11 to protect their interests; or

12 "(2) the party opposing the class has acted or refused
13 to act on ground generally applicable to the class, thereby making
14 appropriate final injunctive relief or corresponding declaratory
15 relief with respect to the class as a whole; or

16 "(3) the court finds that the questions of law or
17 fact common to the members of the class predominate over any
18 questions affecting only individual members, and that a class
19 action is superior to other available methods for the fair and
20 efficient adjudication of the controversy. The matters pertinent
21 to the findings include:

22 "(A) the interest of members of the class in
23 individually controlling the prosecution or defense of separate
24 actions;

25 "(B) the extent and nature of any litigation
26 concerning the controversy already commenced by or against members

1 of the class;

2 "(C) the desirability or undesirability of
3 controversy concentrating the litigation of the claims in the
4 particular forum; and

5 "(D) the difficulties likely to be encountered
6 in the management of a class action.

7 "(c) In construing this section, the courts of Texas shall
8 be guided by the decisions of the federal courts interpreting
9 Rule 23, Federal Rules of Civil Procedure, as amended.

10 "(d) As soon as practicable after the commencement of an
11 action brought as a class action, the court shall determine by
12 order whether it is to be maintained as a class action. An order
13 under this subsection may be altered or amended before a decision
14 on the merits. An order determining that the action may or may
15 not be brought as a class action is an interlocutory order which
16 is appealable and the procedures provided in Rule 385, Texas Rules
17 of Civil Procedure, apply.

18 "(e) If the action is permitted as a class action, the
19 court shall direct to the members of the class the best notice
20 practicable under the circumstances, including individual notice
21 to all members who can be identified through reasonable effort.

22 "(f) The notice shall contain a statement that:

23 "(1) the court will exclude the member notified from
24 the class if he so requests by a specified date;

25 "(2) the judgment, whether favorable or not, will
26 include all members who do not request exclusion; and

1 "(3) any member who does not request exclusion, if
2 he desires, may enter an appearance through counsel.

3 "(g) A class action may not be dismissed, settled, or
4 compromised without the approval of the court, and notice of the
5 proposed dismissal, settlement, or compromise shall be given to
6 all members of the class in such manner as the court directs.

7 "(h) When appropriate, an action may be brought or
8 maintained as a class action with respect to particular issues
9 or a class may be divided into subclasses and each subclass treated
10 as a class, and the provisions of this section shall be construed
11 and applied accordingly.

12 "(i) The judgment in a class action shall describe those
13 to whom the notice was directed and who have not requested
14 exclusion and those the court finds to be members of the class.
15 The court shall direct to the members of the class the best notice
16 practicable under the circumstances, including individual notice
17 to all members who can be identified through reasonable effort.

18 "(j) In the conduct of a class action the court may make
19 appropriate orders:

20 "(1) determining the course of proceedings or
21 prescribing measures to prevent undue repetition or complication
22 in the presentation of evidence or argument;

23 "(2) requiring, for the protection of the members
24 of the class or otherwise for the fair conduct of the action,
25 that notice be given in such manner as the court may direct to
26 some or all of the members or to the Attorney General of any step

1 in the action, or of the proposed extent of the judgment, or of
2 the opportunity of members to signify whether they consider the
3 representation fair and adequate, to intervene and present claims
4 or defenses, or otherwise to come into the action;

5 "(3) imposing conditions on the representative parties
6 or on intervenors;

7 "(4) requiring that the pleadings be amended to
8 eliminate allegations as to representation of absent persons, and
9 that the action proceed accordingly; or

10 "(5) dealing with similar procedural matters.

11 "(k) The filing of a suit under this section tolls the
12 statute of limitations for bringing a suit by an individual under
13 Section 16 of this Article. An order of the court denying the
14 bringing of a suit as a class action does not affect the ability
15 of an individual to bring the same or a similar suit under Section
16 of this Article.

17 "Section 19. Preliminary Notice. (a) At least 30 days
18 prior to the commencement of a class action suit for damages under
19 Section 17 of this Article, the prospective plaintiff must notify
20 the intended defendant of his complaint and make demand that the
21 defendant provide relief to the prospective plaintiff and others
22 similarly situated. A copy of the notice must also be sent to
23 the commissioner of insurance.

24 "(b) The notice must be in writing and sent by certified
25 or registered mail, return receipt requested, to the place where
26 the transaction occurred, the intended defendant's principal place

1 of business in this state, or if neither will effect notice, to
2 the office of the Secretary of State of Texas.

3 "(c) An action for injunctive relief under Section 17 of
4 this Article may be commenced without compliance with Subsection
5 (a) of this section. Not less than 30 days after the commencement
6 of an action for injunctive relief, and after compliance with the
7 provisions of Subsection (a) of this section, the plaintiff may
8 amend his complaint without leave of court to include a request
9 for damages.

10 "(d) No damages may be awarded to a class under Section
11 17 of this Article if within 30 days of receipt of the notice the
12 intended defendant furnished the plaintiff, by certified or
13 registered mail, return receipt requested, a written offer of
14 settlement. The offer of settlement must include a statement
15 that:

16 "(1) all others similarly situated have been
17 adequately identified or a reasonable effort to identify such
18 others has been made, and a description of the class so identified
19 and the method employed to identify them;

20 "(2) all persons so identified have been notified
21 that upon request the intended defendant will provide relief to
22 them and all others similarly situated, and a complete explanation
23 of the relief being afforded and a copy of the notice or
24 communication which the intended defendant is providing to the
25 members of the class;

26 "(3) the relief being afforded the consumer has been,

1 or if said offer is accepted by the consumer, will be given within
2 a stated reasonable time; and

3 "(4) the practice complained of has ceased.

4 "(e) Attempts to comply with the provisions of this section
5 by a person receiving a demand shall be an offer to compromise
6 and shall be inadmissible as evidence. Attempts to comply with
7 a demand shall not be considered an admission of engaging in an
8 unlawful act or practice. Evidence of compliance or attempts to
9 comply with the provisions of this section may be introduced by
10 a defendant for the purpose of establishing good faith or to show
11 compliance with the provisions of this section.

12 "Section 20. Damages: Defense. No award of damages may
13 be given in any class action filed under Section 17 of this Article
14 if the defendant:

15 "(1) proves that the action complained of resulted
16 from a bona fide error notwithstanding the use of reasonable
17 procedures adopted to avoid any error; and

18 "(2) made restitution of any consideration received
19 from any member of the class.

20 "Section 21. Venue. Any action brought under this Article
21 shall be commenced in a district court of Travis County, Texas,
22 if the State Board of Insurance is a party thereto.

23 "Section 22. Voluntary Compliance. (a) In the
24 administration of this Article the Board may accept assurance of
25 voluntary compliance with respect to any act or practice which
26 violates this Article or regulations issued under this Article

1 or any act declared to be unlawful in Section 17.46 of the Business
2 & Commerce Code, as amended, from any person who is engaging in,
3 has engaged in, or is about to engage in the act or practice.
4 The assurance shall be in writing and shall be filed with the
5 Board.

6 "(b) The acceptance of an assurance of voluntary compliance
7 may be conditioned on the stipulation that the person in violation
8 of this Article or regulations issued under this Article, or
9 Section 17.46, Business & Commerce Code, as amended, restore to
10 any person in interest any money which may have been acquired by
11 means of acts or practices which violate this Article or
12 regulations issued under this Article, or Section 17.46, Business
13 & Commerce Code, as amended.

14 "(c) An assurance of voluntary compliance shall not be
15 considered an admission of prior violation of this Article or
16 regulations issued under this Article or Section 17.46, Business
17 & Commerce Code, as amended. However, unless an assurance has
18 been rescinded by agreement, subsequent failure to comply with
19 the terms of an assurance is prima facie evidence of a violation
20 of this Article or regulations issued under this Article or Section
21 17.46, Business & Commerce Code, as amended.

22 "(d) Matters closed by the filing of an assurance of
23 voluntary compliance may be reopened at any time. Assurance of
24 voluntary compliance shall in no way affect individual rights of
25 action under this Article, except that the right of individuals
26 with regard to money received pursuant to a stipulation in the

1 voluntary compliance under Subsection (b) of this section are
2 governed by the terms of the voluntary compliance.

3 "Section 23. Those civil penalties, premium refunds,
4 judgments, compensatory judgments, individual recoveries, orders,
5 class action awards, costs, damages, or attorneys' fees which are
6 assessed or awarded as provided in this Article shall be paid
7 only from the capital or surplus funds of the offending insurance
8 company, and no such payments shall take precedence over, be in
9 priority to, or in any manner be applicable to the provisions of
10 Article 21.28-B, Texas Insurance Code, known as the Loss Claimant's
11 Priorities Act, Article 21.28-C, Texas Insurance Code, known as
12 the Property and Casualty Insurance Guaranty Act, Article 21.28-E,
13 Texas Insurance Code, known as the Texas Life, Health and Accident
14 Guaranty Act, any other similar insurance guaranty act hereafter
15 enacted by the Texas Legislature, or Article 21.39-A, Texas
16 Insurance Code, known as the Asset Protection Act, and such special
17 statutes and the priorities of funds created thereby shall be
18 exempt from the provisions of this Article.

19 "Section 24. No remedy or civil penalty shall lie or exist
20 by reason of any act or omission occurring prior to the effective
21 date of this Act."

22 Sec. 3. Chapter 10, Title 79, Revised Civil Statutes of
23 Texas, 1925, as amended (Article 5069-10.01, et seq., Vernon's
24 Texas Civil Statutes), is repealed.

25 Sec. 4. If any provision of this Act or the application
26 thereof to any person or circumstances is held invalid, such

1 invalidity shall not affect other provisions or applications of
2 the Act which can be given effect without the invalid provision
3 or application, and to this end the provisions of this Act are
4 declared to be severable.

5 Sec. 5. The importance of this legislation and the crowded
6 condition of the calendars in both houses create an emergency and
7 an imperative public necessity that the constitutional rule
8 requiring bills to be read on three several days in each house
9 be suspended, and this rule is hereby suspended, and that this
10 Act take effect and be in force from and after its passage, and
11 it is so enacted.

FORM A

COMMITTEE REPORT

Date 5/2/73

HONORABLE PRICE DANIEL, JR.

Speaker of the House of Representatives.

Sir:

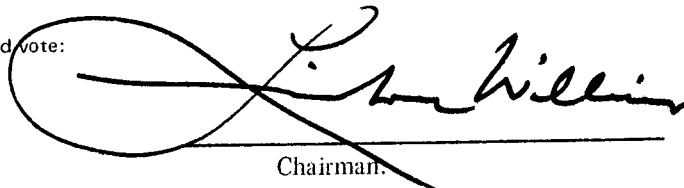
We, your Committee on Business and Industry, to whom was referred S.B. No. 75, have had the same under consideration and beg to report back with recommendation that it (do) pass.

~~The Committee recommends that this measure be considered for the Local and Consent Calendar.~~

House sponsor of Senate measure: Lary

The measure was reported from Committee by the following record vote:

| | |
|-----------|---------------------|
| <u>14</u> | ayes |
| <u>0</u> | nays |
| <u>8</u> | present, not voting |
| <u>9</u> | absent |


Chairman.

This measure proposes new law.

Background Information and Purpose of this Bill: The bill originated in Attorney General John Hill's office and is a primary party of his consumer protection program. It strikes directly at the inequities now existing in consumer protection legislation, and will provide remedies under which the Attorney General's Office can properly determine between premeditated practiced deception and honest error, thereby providing both proof and penalty to be exercised by his office. Presently, the Attorney General's office gets thirty to forty complaints per day against fraudulent or deceptive practices. This bill would provide a means by which the consumer could sue and recover damages plus attorneys fees, if the consumer can adequately show that the Act has been violated. Under our system as it now stands, a suit can be filed by a consumer against a person or organization committing an act, but the consumer must prove common law fraud. The present conditions provide only for the Attorney General's office to bring in a restraining order and limits their ability to prosecute. The common law remedy is not adequate for a consumer to recover the loss, thereby making this bill a major step in the direction of providing the consumer, through the Attorney General's office, with the necessary tools for equitable recovery subject to, of course, a ruling in favor of the consumer.

Section by Section Analysis:

Section 1. Chapter 17, Business & Commerce Code, as amended, is amended by adding subchapter E to read as follows: "Subchapter E. Deceptive Trade Practices and Consumer Remedies." This part of the bill discusses in detail in Sections 17.41 of Subchapter E, through Section 17.63 of Subchapter E, the details of the addition to the code as amended.

Section 17.41: Short Title.

Section 17.42: Waiver. No consumer may waive his legal rights under the law.

Section 17.43: Makes the remedies here in addition to existing remedies.

Section 17.44: Provides for liberal construction and application for the purposes of the bill, and details what the consumer is protected against.

Section 17.45: Definitions.

Section 17.46: Describes what deceptive trade practices are unlawful.

Section 17.47: Restraining Orders. Sets forth in great detail the manner by which the Consumer Protection Division shall go about obtaining restraining orders, including of course, temporary or permanent injunctions, further providing penalties for the violations of restraining orders in limits, awarding of civil penalties to be applicable only to those violations occurring prior to the awarding of the restraining order or injunction.

Section 17.48: Sets forth the duties of the District, County and City Attorneys as relating to the enforcement of this Act.

Section 17.49: Specific exemptions from this Act include newspaper, magazine, or telephone directory, or broadcast station, or billboard, when an advertisement has been placed in one of these without the knowledge of the previous mentioned media as to the lawfulness of a specific act which is to be carried out by the firm doing the advertising. This section further points out that an act or practice is not authorized simply because it is not specifically mentioned in this Act or in Federal Laws.

Section 17.50. Relief for Consumers. This particular Section points out the method and manner of redress to a consumer who has been damaged by one of the practices considered unlawful by this bill. This includes three times the amount of actual damages plus court costs and attorneys fees and any other relief which the court deems proper. However, if the court finds that an action in this section was groundless and brought for the purpose of harrassment, the court may award the defendant reasonable attorneys fees in relation to the amount of work expended.

Section 17.51. Class Actions. This section provides that any defendant may bring a class action suit on behalf of himself and other consumers who have been damaged similarly. Redress for class actions is similar to that of individuals.

Section 17.52. Class Action Procedures spelled out here to provide uniformity.

Section 17.53. Preliminary notice must be given at least thirty days prior to the commencement of a suit for damages under section 17.53 of this subchapter and the consumer must notify the intended defendant of his complaint and make demand that the defendant provide relief to the consumer and others similarly situated. This section further points out the manner in which this must be done.

Section 17.54. Provides the damages shall not be awarded if an action complained of, results from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid error, or if restitution has been made.

Section 17.55. Promotional Material. This particular area provides that sellers of goods or services may obtain damages against a third party employed to provide advertising for their goods, when that third party violates this act and subsequent action results in the seller having to make restitution to the customer.

Section 17.56. Venue: The county in which the person against whom the suit is brought resides, has his principal place of business, or is doing business.

Section 17.57. Discusses the manner in which subpoenas may be issued.

Section 17.58. This provision allows for voluntary compliance which must be in writing and restitution for any previous violations must be made with the consideration that the assurance of voluntary compliance shall not be considered admission to prior violation of this subtitle. This section further provides that voluntary compliance does not limit reopening of complaints, previous in nature, nor does it limit individual rights of action, except as the terms of this Act so limit.

Section 17.59. This provision details the powers the receiver may have, having been appointed by the court to administer reparations. It further provides that if claims of the consumer have not been met as specified all persons who participated knowingly in terms of contributions of substantial personal services, money, credit, real, personal or mixed property, or anything of substantial value may be held jointly and severally liable (con't on next page)

to the extent of the unsatisfied consumer claim. If they were a part of the venture to the extent of sharing in the profits of the enterprise, and had knowledge or should have had knowledge of the unlawful purpose of the enterprise at the time such things of value were contributed, or freely continued in the association or other relationships after gaining knowledge of the unlawful purpose of the enterprise, then they are also subject to this Act.

Section 17.60: This provision provides that if the Consumer Protection Division feels anyone has violated this Act, they may require a report and the person or persons may be examined under oath about the facts and circumstances concerning the alleged violation. They may further, with the approval of the court, impound any sample of merchandise that is produced in accordance with this subchapter.

Section 17.61: Provides for civil investigative demands which would allow the Consumer Protection Division to require the person, or persons, investigated to produce documentary material and permit inspection relative thereto, with necessary copies to be made on request. This is not limited to persons residing within the state if their conduct has been in violation of this subchapter within the State of Texas.

Section 17.62: Penalties. (a) Defines the circumstances under which any person attempting to avoid, evade or prevent compliance with this act or conceals, withholds, destroys, mutilates or otherwise falsifies documentary material or merchandise is thereby guilty of a misdemeanor. (b) Describes the penalties for failing to comply with Sec. 17.60 or with any civil investigation demand for documentary material served on him. It provides that the consumer protection division may seek redress under the measure provided in the bill. (c) Provides where the jurisdiction on the case will lie and where the final appeal will be with failure to comply to the request being punishable by contempt.

Section 17.63: Application. Provides that only acts committed since the enactment of this bill will be under the power granted to the Attorney General under Chapter 10, Title 79, Revised Civil Statutes of the State of Texas, 1925, as amended.

Sec. 2. (a). Amends Section 13, Art. 21.21, Texas Insurance Code as follows: Section 13 - Rules and Regulations. The first part of this is what was previously the entire section on rules and regulations. It is now titled Section 13.

(a). Authorizes Board to promulgate Rules and Regulations.

(b). Provides that a petition by 100 persons properly signed with proper evidence may be used to question an act which is considered to be false, misleading or deceptive to the insurance buying public. Within that thirty days the board must act to either deny the petition or initiate hearings.

(c). Requires the State Board of Insurance to state the reasons for denial. Denial is possible under several circumstances.

(d). The board may hold a public hearing in response to the petition.

(e). Anyone contesting a judgment or regulation set up by the State board may appeal that judgment in the District Court of Travis County for declaratory judgment.

(f). Sets out the six instances in which the Board's action may be invalidated.

Sec. 2. (b) Amends Section 7, Article 21.21, as follows:

Sec. 7. Cease and Desist Orders. (a) Authorizes the Board to issue cease and desist orders against persons violating the provisions of this Act or the Board's Rules or Regulations.

(b) No change from existing law.

(c) Provides for a civil penalty of not more than \$1,000 per day, not to exceed a total of \$5,000, for violation of a cease and desist order.

(d) Provides civil penalties apply only to violations prior to the penalty order.

Sec. 2.(c) Amends Article 21.21 by adding new Sections 14 through 21 as follows:

Section 14. Provides for an administrative class action in which the board may order an insurer or insurance agent in violation of Article 21.21, regulations issued under Article 21.21, or Section 17.46, Business and Commerce Code, to refund premiums to persons induced to pay the premium as a result of the violation.

Section 15. Relates to the Attorney General filing a suit against a member of the insurance industry on the request of the State Board of Insurance and is substantially the same as Section 17.47, Business and Commerce Code.

Section 16. Provides a private right of action for an individual for a violation of Article 21.21, Insurance Code, regulations issued under that Article, or Section 17.46, Business and Commerce Code, and is substantially the same as Sections 17.50 and 17.51, Business and Commerce Code. A private class action is stayed if an administrative class action on the same subject and same defendant has been instituted by the State Board of Insurance under Section 14 of Article 21.21.

Section 17. Delineates the procedures available for class actions.

Section 18. Sets out the procedure for a private class action and is the same as Section 17.52, Business and Commerce Code.

Section 19. Relates to the giving of notice to the proposed defendant 30 prior to instituting a class action for damages. It is substantially the same as Section 17.53, Business and Commerce Code.

Section 20. Provides for the bona fide error defense in class actions and is the same as Section 17.54, Business and Commerce Code.

Section 21. Puts venue for proceedings under this Article in Travis County if the State Board of Insurance is a party to the suit.

Section 22. Allows the State Board of Insurance to accept assurance of voluntary compliance for violations of Article 21.21, regulations issued under that Article, or Section 17.46, Business and Commerce Code. It is substantially the same as Section 17.58, Business and Commerce Code.

Section 23. Provides that judgments awarded under this Article must be paid from the capital or surplus funds of the offending insurance company. This is to give the policyholders priority in any case of insolvency arising from a suit under this Article.

Section 24. Provides that the provisions of this Act apply only to acts or practices occurring after the effective date of the Act.

Sec. 3. Repeals Chapter 10, Title 79, Revised Civil Statutes of Texas, 1925, as amended (Article 5069-10.01 et seq., Vernon's Texas Civil Statutes.

Section 4. Severability Clause.

Section 5. Emergency Clause.

ACTION TAKEN BY THE COMMITTEE:

This bill which is companion bill to H.B. 417 was heard at the 9:00 A.M. meeting on Wednesday, May 2, 1973 on the Committee on Business and Industry. By unanimous vote, motion made to send to House floor with favorable recommendation.

No. 75

By *Mary*

AN ACT relating to the definition and regulation of unlawful trade, acts and practices, the protection of Texas consumers, and providing for consumer remedies; . . . ; and declaring an emergency.

KB 417
1-25-73 Filed with the Secretary of the Senate

JAN 29 1973 Read, referred to Committee on HUMAN RESOURCES

Reported favorably.

FEB 15 1973 Reported adversely, with favorable Committee Substitute; Committee Substitute read first time.

Ordered not printed.

MAR 19 1973 Senate and Constitutional Rules to permit consideration suspended by unanimous consent. *failed to*
18 yeas, 12 nays.

To permit consideration, reading and passage, Senate and Constitutional Rules suspended by vote of yeas nays.

APR 13 1973 Read second time, and *amended* ordered engrossed, passed to third reading.

Caption ordered amended to conform to body of bill.

Senate and Constitutional 3-Day Rules suspended by vote of yeas, nays to place bill on third reading and final passage.

APR 17 1973 Read third time and passed by 23 yeas, 6 nays.

OTHER ACTION

MAR 29 1973

Ordered recommitted to Committee on JURISPRUDENCE for a period not to exceed 10 days by 21 yeas, 9 nays

Secretary of the Senate

inside

* APR 11 1973 Reported adversely, with favorable Committee Substitute; Committee Substitute read first time.

APR 17 1973 Engrossed
APR 18 1973 Sent to HOUSE

ENGROSSING CLERK

APR 18 1973

Received from the Senate

Dorothy Hallman
Chief Clerk, House of Representatives

APR 25 1973

READ FIRST TIME AND REFERRED TO COMMITTEE ON *Business & Industry*

Dorothy Hallman
Chief Clerk, House of Representatives

MAY 8 1973 REPORTED FAVORABLY SENT TO PRINTER

MAY 9 1973 ORDERED NOT PRINTED

APR 13 1973

* Regular order of business
suspended by "19 years
and 8 nap."

* APR 16 1973 Laid out and ordered
engrossed with amendments
by viva-vote vote.

MAY 9 1973

LAID ON THE
TABLE SUBJECT TO CALL

Dorothy Hallman
Chief Clerk, House of Representatives